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**DRIVING TOWARD AUTONOMY?  
THE FBI IN THE FEDERAL SYSTEM, 1908-1960**

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# Driving toward Autonomy? The FBI in the Federal System, 1908-1960

Daniel Richman and Sarah Seo<sup>1</sup>

**ABSTRACT.** This paper explains the growth of the FBI (“Bureau”) in the United States at a time when criminal justice was largely a local matter by reframing the criminal justice “(eco)system” in terms of informational economy, rather than jurisdictional authority. It argues that the Bureau came to occupy a key position in the national law enforcement ecosystem by providing an informational infrastructure that enabled it to cultivate relationships with local police agencies. This history offers two insights about the nature of American state and federalism in the twentieth century. First, the Bureau’s particular strategy for enlarging its capacity beyond its small size had the ironic effect of trading bureaucratic autonomy for political and operational support. Second, the strategy impeded the development of the states’ role in criminal law enforcement and stymied state-state collaborations. The patterns of collaboration that were set by the 1920s provided the blueprint for the federal government’s anti-crime initiatives throughout the rest of the century.

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## I. Introduction

Although President Trump’s claims that there is a deep state and that the Federal Bureau of Investigation (FBI) is a central part of it may be incoherent,<sup>2</sup> the Bureau<sup>3</sup> has indeed long been ensconced in the American state and psyche. But how did a small federal agency that began with minimal and underdefined investigative responsibilities embed itself in the national law enforcement “ecosystem”<sup>4</sup> in the United States where criminal justice was, and still is, a local matter? In this paper, we explain how this occurred less through jurisdictional expansion and more by providing an informational infrastructure that allowed the Bureau to cement relationships with local police departments. We then make two arguments based on this history of the Bureau’s criminal work during its first half-century (1908-58). First, the way in which the Bureau enlarged its capacity had the ironic effect of limiting its bureaucratic autonomy, a dynamic that highlights the conditional nature of American state-building in the twentieth century and has implications for the Bureau’s position today. Second, the strategy also had consequences for American federalism, by impeding the development of the states’ role in criminal law enforcement and retarding state-state collaborations.

The story of how the Bureau constructed the national criminal enforcement architecture and made itself the keystone has usually been told with reference to notorious episodes that have captured the national imagination: the Palmer raids, the Red Scare, Dillinger, Nazi saboteurs, and COINTELPRO and MLK Jr., to name a few. Many of these moments have been linked to the creation of a “national security state” and the targeting of domestic “subversion,” with J. Edgar Hoover looming large in most narratives. These histories are not wrong. Presidents from FDR through at least Nixon turned to the Bureau for investigative assistance and political intelligence. So too has the Bureau’s domestic security docket expanded in times of real or perceived national emergencies. And going after Famous Bad Guys has been a strategy for bureaucratic acclaim, however short-lived.

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<sup>2</sup> Philip Bump, *The Deep State Strikes Back: Former FBI Leaders Rebut Questions About the Russia Investigation*, Wash. Post, May 10, 2019.

<sup>3</sup> For narrative ease, we use “Bureau” to refer to the agency variously called the “Division of Investigation,” the “Bureau of Investigation,” and the “Federal Bureau of Investigation” (from 1934 on).

<sup>4</sup> We use “ecosystem” to capture the multiple actors and institutions engaged in policing work, with various degrees of interaction. And we draw on Patrick Joyce to distinguish a “network” from a “system.” Patrick Joyce, *The State of Freedom: A Social History of the British State Since 1800*, at 58 (2013) (“A network denotes an element of openness, drawing on the idea of the lattice or the web. A ‘system’ denotes more what is closed and can be self-referring or self-regulating.”). We leave to others the more capacious and fraught issue of “criminal justice system” identification. See Sara Mayeux, *The Idea of the Criminal Justice System*, 45 Am. J. Crim. L. 55 (2018); Bernard Harcourt, *The Systems Fallacy: From Operations Research to Contemporary Cost-Benefit Analysis: The Perils of Systems Analysis, Past and Present* (manuscript 2014).

Yet these familiar stories do not adequately explain the Bureau's political staying power and the historical development of its capabilities in the policing realm. Presidential favor, national fears, and high-profile takedowns have their limits in a nation where such patronage presents a double-edged sword, fears come and go, and the supply of notorious criminals is not always steady. Tooting one's own horn helps, and the Bureau's public-relations efforts are legendary. But legends did not drive the appropriations that the Bureau needed to survive and thrive during shifting winds. And self-promotion certainly did not strengthen the Bureau's informational networks, which depended largely on local departments not keen to be left out of the limelight.

Scholarship focusing more on statutory, rather than agency, development has followed the arc of "overfederalization" in which proliferating federal criminal laws broadened the jurisdiction of federal enforcement agencies that overlapped with traditional spheres of local police power.<sup>5</sup> This literature is of course correct to highlight the impressive number of additions to the United States Code, many of which criminalized conduct already addressed under state laws. Yet that literature too often fails to consider operational realities and the very nature of the criminal enforcement project. Even as its jurisdiction and size increased, the Bureau never had the capacity, or interest, to intrude at will onto local turf.

A recognition of these on-the-ground, day-to-day realities should push us to think beyond formal notions about federalism and to consider the workings of the American federal law enforcement apparatus. How did the federal government justify its involvement in crime control, and how did the Bureau take part in its anti-crime efforts? More specifically, how did the Bureau—with limited resources and against a backdrop of serious concerns, particularly from southern states, about the national government's expansion—grow and flourish at minimal cost and disruption to the federal-state relationship? And how did this development shape the Bureau itself?

To answer these questions, our story focuses not on what the Bureau is remembered for doing—often the product of its own storytelling—and more on what it actually spent its time doing during its first half century, from its creation in 1908 to 1960. And it looks beyond the statistics that Hoover marshaled to demonstrate the Bureau's effectiveness to how, exactly, the Bureau pursued its law enforcement mission. Doing so requires attention to the needs of crime control at the local level as well as the realities of a multi-jurisdictional nation in an increasingly mobile world.

At the heart of any criminal justice project is the acquisition and use of crime-related information. Before the twentieth century, police patrol provided both direct procurement of information by beat officers and derivative procurement through contacts with citizens who had information.<sup>6</sup> But at the turn of the century, especially when mass-produced automobiles gave

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<sup>5</sup> See, e.g., Stephen F. Smith, *Overfederalization*, in 1 *Academy for Justice* 39 (2017) (citing literature); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009). But see Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 *Emory L.J.* 1 (2012).

<sup>6</sup> Christopher Thale, *The Informal World of Police Patrol*, 33 *J. Urban Hist.* 183 (2007); Raymond B. Fosdick, *American Police Systems* (1920); Roger Lane, *Urban Police and Crime in Nineteenth-Century America*, 1, in 15 *Crime & Justice: Modern Policing* (1992).

individuals—and criminals—unprecedented mobility, local law enforcement confronted the reality that they needed information from outside their jurisdictions, which motivated them—or at least the most conscientious departments—to seek information-sharing arrangements. But creating an informational infrastructure proved difficult in a federal system. One possibility was to create a horizontal network, but the lack of state-to-state cooperation even where constitutionally mandated (as for fugitives), and the commons problem of state funding for such a network, made this option close to impossible. The fact that counties, not states, were the real sites of criminal enforcement didn't help either.

The other possibility was a federal infrastructure. Around this same period, the federal government—called on to address crimes with an interstate aspect—was becoming a potential competitor for the use of this information. Still, local police embraced an informational infrastructure managed by the Bureau and, in exchange, to contribute information to it. For they knew that the feds, because of their small size and lack of patrol duties would depend on them for criminal information to bring their cases. The story of the Bureau from its beginning has been about its oversight, cultivation, and use of this informational give and take.

The Bureau's growth thus can be understood only by reframing the criminal justice ecosystem in terms of informational economy rather than jurisdictional authority. Within this ecosystem, local police departments first tried to create their own networks to share information, mainly through the International Association of Chiefs of Police (IACP). But they ultimately relied on the Bureau to provide a platform to facilitate information exchange. This paper provides an account of how the Bureau created that platform in two main ways. First, it translated the new federal criminal statutes, in particular the National Motor Vehicle Theft (Dyer) Act, into a mandate to assist local agencies. A significant portion of the Bureau's caseload during its first fifty years was auto theft cases. This did not mean that the Bureau itself investigated and prosecuted these cases; rather, its role often amounted to "packaging" information across jurisdictions and then "gifting" the cases to local departments for prosecution. Second, the Bureau administered the National Division of Identification and Information, which essentially served as a centralized clearinghouse for crime-related information for local, state, and federal enforcement agencies.

The Bureau's commitment to both projects, far from intruding on local domains, allowed police departments to retain considerable independence from state governments even as the new (auto)mobility limited their reach. Its service mission had implications on the Bureau's "autonomy" as well. While the Bureau grew to become an important and powerful federal agency, its history suggests a legitimacy rooted in local support—a history that continues to have implications for today.

The paper begins in Part II with the construction of the national law enforcement ecosystem in the first two decades of the twentieth century. Part III then details how this infrastructure for information sharing laid the foundation for FDR's war on crime in the 1930s and continued to provide the blueprint for the federal government's anti-crime initiatives throughout the twentieth century. Finally, Part IV explores the implications of our story, first for

the Bureau's "autonomy"<sup>7</sup> during its first half-century and perhaps far beyond, and second for horizontal federalism in the policing context.

## II. From Fragmentation toward Network

Given that crime and punishment are traditionally local matters, why in the early twentieth century did Congress enact a slew of federal criminal laws, including laws that overlapped with state criminal laws? And how did the Bureau come to occupy a prominent position in the national law enforcement ecosystem that emerged?

This section examines how the Bureau found its role within a legislative framework created by a Congress whose very embrace of criminal justice localism led it to create new federal offenses structured to aid local departments and respect local sensibilities. Crucial to this story are the unprecedented changes in mobility that the mass production of cars introduced in American society, forcing adaptations to traditional law enforcement arrangements. Through public and private alliances, the Bureau earned a place for itself in the criminal justice ecosystem by translating its mandate to enforce federal laws into a mandate to serve local law enforcement.

### A. Transitions in an Automotive Society

Before the twentieth century, the federal government lacked a general criminal investigative force. It did not have many criminal laws either. In the nineteenth century, federal authorities prosecuted crimes listed in the US Constitution (piracy, counterfeiting, treason, and felonies committed on the high seas), perjury and bribery committed in connection with federal cases, extortion of federal officers, thefts of federal property, arson on federal vessels, and revenue crimes. Even after the Civil War, when Congress slightly expanded the national government's criminal docket with statutes protecting civil rights and regulating the mails, the new Department of Justice (DOJ) and its US Attorneys' offices<sup>8</sup> relied on private detectives or borrowed Secret Service agents from the Treasury Department.

Other than the crimes that fell within the federal government's strictly delineated jurisdiction, the rest of police<sup>9</sup> regulation and enforcement occurred at the local level. It is true that criminal enforcement's reliance on closely held information generally tends to pull authority down to the lowest levels even in the most centralized policing regimes.<sup>10</sup> But Americans also held fast to local governance as a matter of principle (and racialized preference). Centralized police forces were anathema, and federal criminal interventions politically fraught, especially in

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<sup>7</sup> For recent allusions to the Bureau's autonomy, see, e.g., Patrick S. Roberts, *How Security Agencies Control Change: Executive Power and the Quest for Autonomy in the FBI and CIA*, Public Organization Review (June 2009); Beverly Gage, *Deep Throat, Watergate, & the Bureaucratic Politics of the FBI*, 24 J. Policy Hist. 157, 159-60 (2012) (on FBI's "autonomy" under Hoover).

<sup>8</sup> See Daniel C. Richman, Kate Stith & William J. Stuntz, *Defining Federal Crimes* (2d ed. 2019).

<sup>9</sup> "Police" in this context is used in the broad sense, referring to regulations, including criminal laws, enacted for the benefit of the public welfare. See Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

<sup>10</sup> See Otwin Marenin, *Police Performance and State Rule: Control and Autonomy in the Exercise of Coercion*, 18 Comparative Politics 101, 107-09 (1985) (on the "work of policing").

the South, where concern that the feds would undermine Jim Crow ran deep.<sup>11</sup> This hostility extended even to the state level. According to one study, in 1905, only five states had some form of state police.<sup>12</sup> Only by the end of the 1930s did all the states establish their own forces.<sup>13</sup>

As a result, crime control in the United States had two distinct characteristics: it was a local matter and often prosecuted privately. Victims—either the individuals themselves or their insurance companies—investigated and pursued charges against perpetrators, who often could not flee very far before the advent of motorized vehicles and better roads. Certainly, train travel enabled jurisdiction skipping, but at a frequency and scale that hired investigators could manage. It also helped that trains followed a schedule set in advance.

Beginning in the last decades of the nineteenth century, both aspects of crime control—local and private enforcement—were changing. By the 1880s, all of the major US cities had established municipal police forces that were slowly but increasingly focusing on crime prevention.<sup>14</sup> Rather than waiting for a privately sworn arrest warrant or for a crime to unfold in their presence before taking action, these officials sought to proactively stop criminals before they could commit their misdeeds. Such preventive policing required knowledge not just of illicit plans, but also of potential criminals, which, in turn, depended on knowledge of their identities and histories.<sup>15</sup> At the same time, Americans' increased mobility, aided first by locomotive trains and then mass-produced cars, made it difficult for local police departments to keep track of habitual offenders. (Auto)mobility also expanded the scope of criminal activities, and towns and cities throughout the country were experiencing the limits of local law enforcement.<sup>16</sup> Train travel made it increasingly possible, for instance, for residents of a dry locale to buy alcohol from

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<sup>11</sup> Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876* (2005); Robert M. Goldman, *A Free Ballot and a Fair Count: The Department of Justice and the Enforcement of Voting Rights in the South, 1877–1893* (2001); Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870–90*, 53 *J. Southern Hist.* 421 (1987); Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth Century America*, 26 *L. & Hist. Rev.* 1 (2008); Scott C. James & Brian L. Lawson, “The Political Economy of Voting Rights Enforcement in America’s Gilded Age: Electoral College Competition, Partisan Commitment, and the Federal Election Law,” 93 *Am. Pol. Sci. Rev.* 115 (1999); Wilbur R. Miller, *The Revenue: Federal Law Enforcement in the Mountain South, 1870–1900*, 55 *J. South. Hist.* 195 (1989); Jonathan Obert, *A Fragmented Force, The Evolution of Federal Law Enforcement in the United States, 1870–1900*, 29 *J. Policy Hist.* 640 (2017).

<sup>12</sup> This story is told more fully in Sarah Seo, *Policing the Open Road* 78 (2019).

<sup>13</sup> Even then, nearly all of them did so to enforce traffic and highway safety laws and not to perform general police functions. For example, Iowa finally established the “Iowa Highway Safety Patrol” only in 1935 after it identified reckless driving as “Public Enemy Number One.” The states did not want their own centralized police forces or even administrative hierarchies that subsumed local forces. When necessity finally compelled them, many states made sure not to confer general police powers to their highway patrollers.

<sup>14</sup> John A. Fairlie, *Police Administration*, 16 *Pol. Sci. Quarterly* 1, 7–8 (1901); Raymond B. Fosdick, *American Police Systems*, 58–117 (1920); Roger Lane, *Urban Police and Crime in Nineteenth-Century America*, 1, in 15 *Crime & Justice: Modern Policing* (1992).

<sup>15</sup> See Sankar diss., 125–35.

<sup>16</sup> See Erik Larson, *Devil in the White City: Murder, Magic, and Madness at the Fair That Changed America* (2004).

a neighboring wet jurisdiction, prompting reformers to try to impose prohibition at the state level.<sup>17</sup>

The automotive revolution in transportation that took off around 1910—Henry Ford perfected the Model T’s moving assembly line in 1914—magnified the challenges to law enforcement.<sup>18</sup> From 1895 to 1929, the number of cars shot up from just 4 (that is, in the single digits) to more than 23 million. This automobile boom contributed to an explosion of crime as the getaway became indispensable for the commission of age-old crimes like bank robberies, kidnapping, and murder. Cars also created a new crime: auto theft. The prominent criminal law scholar Jerome Hall may have found it “quite extraordinary that theft of automobiles should be of particular importance,” but he recognized that the phenomenon “loom[ed] up in unique importance.”<sup>19</sup> Striking the same note, a congressman from Missouri declared in 1919 that there was “no class of criminal enjoying more lucrative gain as a reward for their industry than the automobile thieves of the country.”<sup>20</sup> Although mass production made cars much more affordable to a wider class of consumers, they were still among the most valuable assets for the average family. Motor cars were expensive enough and sufficiently necessary in many parts of the country to support a thriving market for secondhand cars and parts. Standardized cars with standardized parts facilitated this secondary market, as did the automobile manufacturers’ disinclination to develop locking devices and ways of identifying cars and confirming ownership.

Crossing county, state, and even national boundaries became more frequent, and for some, a daily passage from home to work and back. Sophisticated auto theft rings took advantage of the variegated landscape in a federal system of government. They would steal cars in one state and sell them in another where there was no record of the thefts.<sup>21</sup> Operations near the Mexican or Canadian border were especially cunning. During National Prohibition, for example, bootleggers could steal a car in New York, drive to Canada, and sell it there. They could use the proceeds of the sale to purchase liquor in Canada, then steal another car, and transport the illicit goods back to the States, where they could sell the alcohol and the stolen car and make a tidy profit.<sup>22</sup> A more recreational pattern, decried in California, was the “great spring drive,” in which thieves stole “the cars they intend to drive East with the coming of the first warm weather” and sold them when they got there.<sup>23</sup>

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<sup>17</sup> See Richard Hamm, *Shaping the Eighteenth*.

<sup>18</sup> See Seo, *Policing the Open Road*.

<sup>19</sup> Jerome Hall, *Theft, Law, and Society*, 230-31 (1935); see *United States v. Turley*, 352 U.S. 407, 413 (1957) (citing Hall when interpreting what “stolen” means under the Dyer Act).

<sup>20</sup> C.R. House 5474.

<sup>21</sup> As Hoover reported in 1926, “We have bands of automobile thieves who steal machines in one state and pass them over to another band in another state to sell them.” 1926 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1926-1930*, vol. 5 (New York, 1971), 56.

<sup>22</sup> Sauter, *The Origin*, 5.

<sup>23</sup> “Plan to Stop Car Stealing: Auto Club Considering Several Recommendations,” *L.A. Times*, Feb. 29, 1920, at VII (noting that “[I]nvenient jail sentences” “make auto thieving a pastime here”).



In 1926, the *Chicago Daily Tribune* noted these changes when observing that “[t]oday crime is a national affair, run on interstate lines, made so by the railroads and the automobile, principally the latter.”<sup>24</sup> But not too long ago, it reminded readers, crime had been “a local affair,” when criminals “operated locally and disposed of their loot locally.”<sup>25</sup> J. Edgar Hoover likewise reminisced in 1925 (although not from much personal experience):

In times past (and not so far distant past) crime or the criminal was a more or less local issue. Our local or neighborhood criminal was known, his haunts could be watched, his associates shadowed, the method and nature of the crime often bore within itself the recognizable identity of the criminal. He could often be captured on the scene of the crime, the fastest means of locomotion being either human or equine. Then, too, his means of travel, which were limited, could be traced with comparative ease. Should he escape to some other community, the danger of his capture was still imminent. Every stranger was a marked man, every newcomer aroused suspicion.<sup>26</sup>

Notwithstanding these unprecedented law enforcement challenges, crime control remained mostly local during the automobile’s early years. Even in the first decades of the twentieth century, private groups took on the lion’s share of criminal investigations. When a vehicle was stolen, hapless owners would contact local authorities. But they also posted a reward for the recovery of their cars or, if they had auto theft insurance, had their insurers post it. Citizens and businesses soon came together in common cause. As Congressman Newman of Missouri observed, “[s]o frightful has this menace [auto theft] become that automobile clubs and automobile protective associations have been formed, and they have been joined by chambers of commerce and commercial clubs all over the country in an effort to stamp out this lawless industry.”<sup>27</sup>

During this period of transition, citizens and private associations, and especially state and local governments, were quickly discovering their limits in a federalist system. How were law officers whose authority covered only a single jurisdiction to pursue bootleggers, highway robbers, and other fugitives? The mobility of crime also gave rise to the need to share information about runaways, fugitives, arrestees, prisoners, and the recently released. As a New York City police commissioner explained, a fugitive from the state who fled to Chicago to commit more crimes and was there arrested, convicted, and sentenced could, upon release, return to New York unrecognized and with New York police unaware that the fugitive had spent time

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<sup>24</sup> “The Interstate Commerce of Crime,” *Chicago Daily Tribune*, June 17, 1926.

<sup>25</sup> *Id.*

<sup>26</sup> 1925 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1921-1925*, vol. 4 (New York, 1971), 49. See also 1926 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1926-1930*, vol. 5 (New York, 1971), 56 (“Crime of yesterday, accordingly, was an entirely local matter—a Main street affair.”).

<sup>27</sup> C.R. House 5474.

in a Chicago prison in the first place.<sup>28</sup> Other chiefs similarly observed that “professional thieves are constantly moving from one locality to another, one city to another, one State to another. These professionals make circuits and become national characters, traveling and depredating here, there, and everywhere.”<sup>29</sup> Some sort of informational network linking local departments was needed, but jurisdictional limits, fears of centralization, and the challenges of collective action were potent impediments.

## B. Rudimentary Structures Emerge

These social changes prompted at least two efforts toward the creation of a national network. The first came from local police leaders themselves, and the second from the US Justice Department. But the country was not yet ready to set aside its ideological opposition to a national police force. As a result, law enforcement adaptations during the years straddling the turn of the century reflected Martha Derthick’s observation that Americans have “moved paradoxically both to centralize and decentralize.”<sup>30</sup> They also reflected what Gary Gerstle calls the “improvisational” nature of America’s state-building in response to the “governing challenges of the industrial age.”<sup>31</sup>

In 1893, forty-seven progressive police chiefs—leaders of significant local forces—gathered in Chicago to form the National Chiefs of Police Union, with the goal of improving “the detection and prevention of crime in the United States.”<sup>32</sup> As its president explained in 1895, the organization arose from the “constant telegraphic correspondence” among “the police departments of the larger cities,” whose leaders recognized that “the effectiveness of one department depends upon the police system of other cities.”<sup>33</sup> In an increasingly mobile world, they realized, local knowledge was woefully inadequate and stymied preventive policing.

One of the Union’s first agenda items was to create “the National Police Bureau” for “the practical exchange of ideas and information pertaining to police business.”<sup>34</sup> In the beginning, that information focused on the identities of perpetrators based on the Bertillon system, developed in the 1880s and relying on measurements from head to toe “based on the principle that no two adult creatures are alike.”<sup>35</sup> By the early 1900s, the organization, renamed the

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<sup>28</sup> 1924 Congressional hearing, 6.

<sup>29</sup> A Bill for the Creation of a National Bureau of Criminal Identification, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1893-1905*, vol. 1 (New York, 1971), 20.

<sup>30</sup> Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* 11 (2001).

<sup>31</sup> Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* 93 (2015).

<sup>32</sup> “Chiefs of Police Coming,” *The Wash. Post*, Feb. 11, 1895. Police leaders gathered for the first National Police Conference and called for a national criminal identification system in 1871. See Sankar diss., 124-125. But momentum did not gather until 1893. See *id.* at 201.

<sup>33</sup> 1895 Proceedings, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1893-1905*, vol. 1 (New York, 1971), 9.

<sup>34</sup> “Chiefs of Police Coming.”

<sup>35</sup> 1902 Proceedings, 18.

International Association of Chiefs of Police (IACP)—in recognition of the need to communicate with police agencies in foreign countries as well—set up a “bureau of criminal identification.”<sup>36</sup> This exchange received “a lot of fingerprints,” which proved even more reliable than the Bertillon system.

But the dues—about \$25 a year—gathered from the 200 participating departments were insufficient to pay for the distribution of that information.<sup>37</sup> Also, without a critical mass of participating police departments or a central database available to law enforcement throughout the country, the effectiveness of the IACP’s bureau was limited. So in 1901, the IACP looked to the federal government to solve the coordination problem and drafted a bill for Congress to establish “a National Bureau of Criminal Identification in connection with the Department of Justice.”<sup>38</sup> The bill provided for the creation of a DOJ division “where shall be collected and filed, so far as may be practicable for record and report, plates, photographs, outline pictures, descriptions, information, and measurements of all persons who have been or may be convicted and imprisoned” for violating any laws of the United States as well as its “several States and Territories, or the [] municipalities thereof.”<sup>39</sup> To convince Congress to pay for the new division, the IACP pledged that “the Government would receive a full reciprocal amount of aid and information” on federal crimes from local departments.<sup>40</sup> “The whole arrangement,” it envisioned, “would constitute one great web which the malefactor could not elude, and bring the authorities everywhere, Government and State, into full sympathy and co-operation, the Government being amply repaid for the small expenditure.”<sup>41</sup>

Congress, however, needed more persuading.<sup>42</sup> To be sure, many congressmen supported the idea. The House Judiciary Committee reported favorably on the bill; it lifted phrases directly from the IACP’s bill to conclude that not only would the creation of “one great web which the malefactor could not elude” benefit the states, but that the federal government could also be “amply repaid for the small expenditure.”<sup>43</sup> Indeed, the report pointed out that with identification information, police authorities throughout the country could help find military deserters. Moreover, the heads of the Secret Service, the Post Office, and the federal penitentiaries all gave

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<sup>36</sup> 1924 Congressional hearing, 33.

<sup>37</sup> *Id.* at 7, 21, 24, 67.

<sup>38</sup> 1902 IACP Proceedings, at 14; see also 35 Cong. Rec. 5870 (May 23, 1902) (H. R. 100068). See also Letter from Richard Sylvester, Mayor and Superintendent of the Metropolitan Police Department, Urging Legislation Looking to the Establishment in Washington City of a Bureau to be Known as the National Bureau of Criminal Identification, to Senator George G. Vest (December 13, 1900), Document No. 43, 56th Congress 2d Session.

<sup>39</sup> *Id.* at 15.

<sup>40</sup> *Id.* at 19.

<sup>41</sup> *Id.*

<sup>42</sup> See Mary M. Stolberg, Policing the Twilight Zone: Federalizing Crime Fighting during the New Deal, 7 J. of Policy Hist. 393, 395-396 (1995), on opposition to Bureau creation.

<sup>43</sup> Mr. Jenkins, Committee on the Judiciary, Report on National Bureau of Criminal Identification, Report No. 429, 57th Congress, 1st Session (February 7, 1902), 3.

“favorable and unqualified indorsement [*sic*]” because such a national bureau would place them “in closer touch with the police authorities, and a thorough cooperation [would] follow.”<sup>44</sup>

But those in opposition prevailed. The Senate Judiciary Committee “reported adversely” on the bill, which was thereafter “postponed indefinitely.”<sup>45</sup> Without a copy of its report, the precise reasons for the committee’s conclusion are unknown. But the House’s report provides some clues. It maintained, defensively, that it was “not proposed that the bureau shall be a detective agency.”<sup>46</sup> A federal agency with the authority to compile and distribute criminal identification information would, some feared, come too close to a national police force, an abomination to Americans. And so for another two decades, the proposal would languish, and the IACP would continue to maintain its own voluntary network of information sharing.

Even as the grand informational infrastructure plans of those responsible for most criminal enforcement in the country were inching along, the modest informational needs of the federal Justice Department—delegated with the prosecution of a relatively narrow range of cases that mostly came from the Treasury and Post Office<sup>47</sup>—increasingly required executive attention. Before 1908, DOJ borrowed Secret Service agents from Treasury to pursue sundry investigations into violations of the internal revenue, post office, and land laws.<sup>48</sup> In 1907, Attorney General Charles Bonaparte (the Emperor’s grand-nephew) called on Congress to remedy this “anomaly” and establish a “permanent detective force.”<sup>49</sup>

But Congress—some of whose members were implicated in corrupt schemes that DOJ was investigating (an investigation unsurprisingly alleged to be politically motivated)<sup>50</sup>—balked at the proposal. As several of its members pointed out, the United States never had a general police system that spied on its citizens because it was antithetical to American freedom.<sup>51</sup> Not only did Congress reject Bonaparte’s proposal, but so strong was its fear of a political police force that it also moved to preclude the Department’s use of Secret Service agents. US Attorney for the Southern District of New York Henry Stimson worried that this move could destroy the “fighting power of his office.”<sup>52</sup> After Congress adjourned for the summer, Bonaparte,

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<sup>44</sup> Id.

<sup>45</sup> Cong. Rec. 1226, February 3, 1902.

<sup>46</sup> House Judiciary Committee report, 4.

<sup>47</sup> See, e.g. Annual Report of the Attorney General, 1905, at 114-121.

<sup>48</sup> Annual Report of Attorney General, 1906, at 92. In 1905, thirty-two borrowed Secret Service operatives were pursuing investigations for DOJ. Cummings and McFarland, *Federal Justice*, 375.

<sup>49</sup> Annual Report of the Attorney General of the United States for the Year 1907, at 10 (1907).

<sup>50</sup> John Allen Noakes, “Enforcing Domestic Tranquility: State Building and the Origin of the (Federal) Bureau of Investigation, 1908-1920,” at 76-77 (1993 U. Penn PhD Sociology dissertation); Stockham, at 30. But see David Joseph Williams, “Without Understanding: The FBI and Political Surveillance, 1908-1941,” at 32 (Ph.D. dissertation, Univ. of New Hamp. 1981) (maintaining that “at no time” did congressional critics “advance their proposals to protect themselves from possible criminal investigation”).

<sup>51</sup> Lowenthal, 3-4.

<sup>52</sup> Cummings and McFarland, *Federal Justice*, 377.

encouraged by President Theodore Roosevelt, reached into DOJ funds and quietly created an investigative unit.<sup>53</sup>

The following year, in 1909, Congress finally authorized the creation of the Bureau of Investigation, after its members were shamed for opposing a federal law enforcement agency in the middle of an unfolding congressional scandal.<sup>54</sup> The Bureau was ushered into formal existence with promises that it would not become a spy force and would simply support the rather narrow criminal mission of the Justice Department. As Bonaparte had told Congress, “the detective force which minds its own business, and attends to that, and does nothing else, is more effective as a means of suppressing crime than one which is used for any extraneous purpose.”<sup>55</sup> The new Attorney General, George W. Wickersham, heralded the agency’s arrival with a front-page announcement of coordinated raids on a group of fraud-ridden stockbrokers based on the “new” bureau’s wiretap-based investigation.<sup>56</sup> Yet, given that the Bureau lacked arrest powers, and with the real manpower for the arrests coming from the Secret Service, the Bureau’s ancillary status could not have been clearer.

### C. Substantive Criminal Laws and Enforcement Challenges

Local police departments’ interest in sharing information would, in time, find a champion and platform in the new Bureau. It would never have assumed this role, however, had not a spate of federal criminal enactments, also sparked by the new mobility, given its enforcement responsibilities peculiarly suited to forging a close relationship with departments around the country. The new substantive laws offered a conceptual, federal structure for information flow and enforcement over jurisdictional divides. Given the peculiar genealogies of each legislative foray, and legislators’ lack of thought to enforcement issues, we hesitate to attribute any grand scheming on the part of any political or bureaucratic actors. The ebb and flow of some enforcement priorities, however, and the mutual benefits offered by others, shaped the Bureau and its relationship with its ecosystem.

First, we will explore the new federal statutes, with particular attention to the Dyer Act, as it was the one that most strengthened the new federal network. Then we will set the stage for the Dyer Act enforcement story by showing the disruptive or merely episodic effects of other statutory regimes in action.

#### i. New Statutory Forays

In 1910, Congress passed the Mann Act, which criminalized the interstate transportation of any “woman or girl” for “prostitution or debauchery, or for any other immoral purpose.”<sup>57</sup> In

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<sup>53</sup> Annual Report of the Attorney General of the United States for the Year 1909, at 8-10 (1909); see also Noakes, *supra* note at 72-85; Williams, “Without Understanding,” 38.

<sup>54</sup> Lowenthal, \*\*, see also Cummings and McFarland, *Federal Justice*, 380

<sup>55</sup> Stockham at 57 (quoting Hearings before Subcommittee of House Committee on Appropriations, Sundry Civil Appropriation Bill for 1910 (Washington, D.C.: United States Government Printing Office, 1909), 1003.

<sup>56</sup> Federal Raids on Bucket Shops, *N.Y. Times*, Apr. 3, 1909, at 1.

<sup>57</sup> Mann Act.

1914, it passed the Harrison Anti-Narcotics Act.<sup>58</sup> Following the Mann Act, by analogizing motor vehicles to women, in 1919, Congress enacted the National Motor Vehicle Theft Act (the Dyer Act), which criminalized the interstate transportation of stolen vehicles.<sup>59</sup> That same year, the nation ratified the Eighteenth Amendment to end the shipment of alcohol across state lines; the next year, in 1920, Congress enacted the Volstead Act, which put National Prohibition into effect.<sup>60</sup>

These new laws stretched long-established bounds of federalism by involving the national government in conventionally local matters. They also showed how the notions of racial threat that generally reinforced hostility to federal power could be deployed to counsel just such authority, so long as it would be mediated by local officials. A febrile mix of “anxiety over young women in urban areas without the protection of fathers or brothers” and “nativist concerns over shifting patterns of immigration and its effect on prostitution” propelled the Mann Act into law.<sup>61</sup> The Harrison Act, though ostensibly required by a treaty obligation, was intended “mainly to aid the states in combatting a local police problem which had gotten somewhat out of hand.”<sup>62</sup> To get the critical support of the Southern Democrats who championed local autonomy in service of white supremacy, State Department officials strategically (and disingenuously) stressed how cocaine would peculiarly affect African-Americans and thus pose a special threat to whites.<sup>63</sup> Key to the support of Prohibition in the South was its framing by evangelicals as “the solution to black savagery.”<sup>64</sup> Conversely, a long effort by the NAACP to get anti-lynching legislation, while succeeding in the House in 1922, thereafter died in the Senate.<sup>65</sup> That such a law would have been little enforced during a period when existing criminal civil rights statutes that easily covered the state-facilitated murders at the heart of the anti-lynching bill<sup>66</sup> went unused until 1940<sup>67</sup> (and still often ended in acquittals<sup>68</sup>) only highlights Southern antipathy to the measure.

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<sup>58</sup> Harrison Act.

<sup>59</sup> Dyer Act.

<sup>60</sup> Volstead Act.

<sup>61</sup> Pliley, *Policing Sexuality*, 65-70.

<sup>62</sup> Rufus G. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 *Yale L.J.* 736, 736 (1953).

<sup>63</sup> See David F. Musto, *The American Disease: Origins of Narcotic Control* 43-44 (3d ed. 1999); Michael M. Cohen, *Jim Crow's Drug War: Race, Coca Cola, and the Southern Origins of Drug Prohibition*, 12 *Southern Cultures* 55, 76-77 (2006).

<sup>64</sup> Joe L. Coker, *Liquor in Land of the Lost Cause: Southern White Evangelicals and the Prohibition Movement*, 124 (2007).

<sup>65</sup> See Megan Ming Francis, *Civil Rights and the Making of the Modern American State* (2014); Jeffrey A. Jenkins, Justin Peck, and Vesla Weaver, *Between Reconstructions: Congressional Action on Civil Rights, 1891-1940*, 24 *Stud. Am. Pol. Dev.* 57, 66-77 (2010); George C. Rable, *The South and the Politics of Antilynching Legislation*, 51 *J. Southern Hist.* 201 (1985).

<sup>66</sup> The 1922 House Bill had a five-year mandatory minimum for state or municipal official who conspired in the lynching of a prisoner in his custody. H.R. 13 (Dyer Bill), 67th Congress.

<sup>67</sup> In 1944, a special assistant to the Attorney General wrote that notwithstanding failed efforts to pass federal anti-lynching legislation, Attorney General Biddle had refused to uncritically accept the notion that “existing statutes were totally impotent to deal with lynching of prisoners in state custody” and advised the President on July

Others have amply explored the political mobilization stories behind the Mann Act and Prohibition.<sup>69</sup> But the backstory to the Dyer Act in particular illustrates the important role of private economic interests in criminal statutory development. In the political economy of the period, the energy of these interests perhaps compensated for the lack of racial animus powering this federal intervention. Moreover, because the Dyer Act responded to material changes that the state writ large could not ignore, this history suggests that some centralization may have been inevitable, even if its specific contours were still open for negotiation.

Mass-produced cars appeared on Main Streets and interstate highways just as progressive police chiefs were beginning to coordinate their activities. But the decentralized organization of law enforcement was ill-suited to pursue automobiles that enabled motorists to flee on a moment's notice. In any case, city or county governments were reluctant to spend money enlarging their police departments to go hunting for criminals who might not fall entirely within their purview. It also did not make sense for municipalities to spend more money as long as the pursuit and prosecution of crime was largely a private matter.

Indeed, it was insurance companies at the front lines of fighting auto theft. Their strategy was to post reward notices within a certain geographic range, usually within a radius of 150 miles or so from the point of theft, since early cars on bad roads could travel only so far.<sup>70</sup> By 1912, a group of insurers decided to economize their efforts by forming the American Protective and Information Bureau (APIB), which served as an information clearinghouse and circulated a single report for all the stolen vehicles they insured.<sup>71</sup>

The APIB was one of those national associations that, as historian Brian Balogh explains, soon came to “overlay” the federal structure, “thickening the opportunities for intercourse” beyond the local or regional and “ultimately changing the very shape of federalism.”<sup>72</sup> In 1918, APIB manager E. L. Rickards and Michael Doyle, director of the American Automobile Insurance Company in St. Louis, Missouri, brainstormed the idea of a national law criminalizing the transportation of stolen vehicles in interstate traffic, believing that “Federal level involvement” would make a difference in combating the problem.<sup>73</sup> Conveniently, Doyle knew

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21, 1942, that “many lynchings, upon investigation, would prove to involve violations of existing federal statutes” Frank Coleman, *Freedom from Fear on the Home Front*, 29 *Iowa L. R.* 415, 425 (1944); see John T. Elliff, *The United States Department of Justice and Individual Rights, 1937-1962*, Harvard Gov. Ph.D. dissertation, 93-111 (1967) (on Civil Rights Section’s 1940 reconsideration of existing statutory authority to prosecute civil rights crimes).

<sup>68</sup> Coleman, *supra* \_\_\_, at 423 (noting “acquittals in addition to those resulting from failure of proof, can be expected where the federal government seeks to prosecute for crimes traditionally deemed the sole concern of the state or local community”).

<sup>69</sup> On Mann Act, see, e.g., Langnum, *Crossing the Line*; Pliley, *Policing Sexuality*. On Prohibition, see, e.g., Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (2015); Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* (2010).

<sup>70</sup> NATB, 75<sup>th</sup> Anniversary, 6.

<sup>71</sup> Sauter, *The Origin*, 2-3; see also 1920-1921 APIB Annual Report, 3.

<sup>72</sup> Brian Balogh, *The Associational State: American Governance in the Twentieth Century*, 31-32 (2015).

<sup>73</sup> NICB Anniversary Book, 24; see APIB, 1920-1921 Annual Report, 3.

his congressman, Leonidas Dyer. The following year in 1919, Dyer introduced H.R. 9203 “to punish the transportation of stolen motor vehicles in interstate or foreign commerce,” which ultimately became the National Motor Vehicle Theft Act, or the Dyer Act.<sup>74</sup>

The House’s discussion of the bill centered on Representative Reavis’s question: “How can a Federal law punish a man for stealing an automobile?”<sup>75</sup> After all, theft was already criminalized under local laws. The IACP, unsure whether Congress had the power to criminalize auto theft, instead suggested that the solution might be for all states to enact such legislation.<sup>76</sup> “Uniform acts” were regularly bandied about during this period as a partial solution to interstate problems.

But in the era of the Mann Act and National Prohibition—within three weeks of the House’s debate, Congress would pass the Volstead Act to enforce the Eighteenth Amendment—it did not take much to convince most national legislators that the federal government had the authority to criminalize the transport of stolen cars across state lines.<sup>77</sup> One congressman argued by analogy that “[i]f the transportation of a woman from one State to another, by means of an automobile, for prostitution, constitutes interstate commerce, then how can it be argued, with any show of color, that the driving of a stolen automobile from one State to another for profit is not interstate commerce?”<sup>78</sup> Several of his colleagues also pointed out that the “favorite place for such thefts is near a State line.”<sup>79</sup> Dyer maintained that auto thefts were “particularly” common in the “cities of the Middle West”—especially in his home state Missouri—and that “State laws upon the subject have been inadequate to meet the evil.”<sup>80</sup> Chief Justice Taft would repeat these arguments in 1924 to uphold the Dyer Act, writing that “[t]he quick passage of the machines”—as cars were often called then—“into another state helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safe place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce.”<sup>81</sup>

Dyer and Newton also argued that the new bill comfortably fell within interstate commerce in a more traditional sense by invoking the interests of the insurance industry. In the

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<sup>74</sup> C.R. House 5470.

<sup>75</sup> C.R. House 5473.

<sup>76</sup> 1918 Proceedings, in Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1893-1905, vol. 3 (New York, 1971), 29-31.

<sup>77</sup> See C.R. House 5471 (“The power of the Congress to enact this law and to punish the theft of automobiles in one State and the removing of them into another State can not [*sic*] be questioned, in view of laws of similar nature heretofore enacted by Congress and the decisions of the Supreme Court of the United States touching same.”).

<sup>78</sup> C.R. House 5476.

<sup>79</sup> C.R. Senate 6433; see also C.R. House 5474.

<sup>80</sup> C.R. House 5470, 5471.

<sup>81</sup> *Brooks v. United States*, 267 U.S. 432, 438-439 (1924). See also *Kelly v. United States*, 277 Fed. 405 (4th Cir. 1921); *Whitaker v. Hitt*, 285 Fed. 797 (D.C. Cir. 1922); *Katz v. United States*, 281 Fed. 129 (6th Cir. 1922); *United States v. Winkler*, 299 Fed. 832 (W.D. Tex. 1924); *Hughes v. United States*, 4 F. 2d 387 (8th Cir. 1925).



face of a high risk of loss, “almost every owner in the land [held] a larceny policy.”<sup>82</sup> But this was precisely the reason why providing insurance against auto theft proved to be a losing business proposition. “One of the reasons why this legislation is needed so badly,” Dyer pointed out, was because “automobile theft insurance has advanced in the past year over 100 per cent on cars costing from \$500 to \$900.”<sup>83</sup> The economics of this situation especially affected ordinary citizens, for “cheaper cars are stolen,” making it “almost impossible for the owners of these cheaper cars to obtain at any rate automobile theft insurance.”<sup>84</sup> Given the recent precedents of the Mann Act and the Volstead Act, as well as the broad reach of auto theft on the material lives of many citizens, it took just one month for Dyer’s bill to become law, on October 29, 1919.

## ii. The Enforcement Challenge

Criminal laws, however, don’t enforce themselves. To enforce the new statutes, Congress appropriated more money to federal agencies, particularly the Justice Department. But it was never enough, leaving DOJ and its Bureau with insufficient manpower to achieve its new assignments. So they relied on the volunteerism of citizens and private organizations as well as collaborations with state and local agencies—collaborations that rendered the feds dependent on the support of these non-federal entities. In Part III, we will show how what Brian Balogh calls the “local, state, voluntary, and private-sector filters that limited federal autonomy” shaped the Bureau’s response to the Dyer Act and, in turn, strengthened the emerging federally mediated network.<sup>85</sup> First, however, we put the Dyer Act story in context and highlight the allure of that enforcement project, by comparing other contemporaneous collaborative efforts and their institutional effects.

The role of the American Protective League (APL) volunteers in reporting subversive activities and enforcing alien registration during World War I is well known, in large part because of their abuses.<sup>86</sup> Their “slacker raids” resulted in the detention of tens of thousands of draft-age citizens, often at bayonet point.<sup>87</sup> President Woodrow Wilson had reservations about the APL’s involvement, but his attorney general persuaded him “that the assistance of APL volunteers was the only way the Bureau could meet the rush of war-time work without adding

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<sup>82</sup> C.R. House 5475.

<sup>83</sup> C.R. House 5472. Lest one be tempted to attribute his efforts solely to solicitude for propertied interests and not, say, an expansive vision of the federal role in criminal enforcement, we note that Dyer—who represented a district that “included many African-American survivors from the violent East St. Louis race riot in 1917,”—was also “the strongest advocate of a federal anti-lynching program in Congress and the institutional voice for the NAACP.” Megan Ming Francis, *Civil Rights and the Making of the Modern American State* 101 (2014); see Jeffrey A. Jenkins, Justin Peck, and Vesla Weaver, *Between Reconstructions: Congressional Action on Civil Rights, 1891-1940*, 24 *Stud. Am. Pol. Dev.* 57, 67 (2010).

<sup>84</sup> *Id.* [Mention interstate aspect of auto insurance industry above the line?]

<sup>85</sup> Balogh, *Associational State*, at 164.

<sup>86</sup> During the war, the APL broadly assisted DOJ, including white slavery officers, in “all kinds of investigations.” Pliley, *Policing Sexuality*, 125; Noakes, “Domestic Tranquility,” 160-161.

<sup>87</sup> David M. Kennedy, *Over Here: The First World War and American Society* 165-166 (2004); Schmidt, 84; Williams, *Without Understanding*, 95-97; Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (2010)

unduly to the permanent federal bureaucracy.”<sup>88</sup> This was so even with soaring congressional appropriations from 1916 to 1919.<sup>89</sup>

Historian Lisa McGirr has also documented how a volunteer army, which included the Ku Klux Klan, enforced Prohibition because many police departments refused to do so and Prohibition agents (at first, under the Treasury Department) proved inadequate to the task. This was most frustrating to a public keeping an eye on unprecedented levels of federal spending to build the Prohibition enforcement apparatus. Even with an agency more than four times the size of the Bureau of Investigation,<sup>90</sup> the head of the Prohibition Bureau declared that his agents could fulfill their task only with “the closest cooperation between the Federal officers and all other law-enforcing officers—State, county, and municipal.”<sup>91</sup>

Unfortunately, cooperation was generally not forthcoming.<sup>92</sup> So President Coolidge tried out a constitutional argument that the Eighteenth Amendment put “a concurrent duty on the States.”<sup>93</sup> The Commissioner of Prohibition likewise insisted that there was “no doubt” that states were required “to exercise in their appropriate sphere of action the full police powers of the State, in order to properly discharge their obligations under the Eighteenth Amendment.”<sup>94</sup> But many states and local governments ignored these claims, most notably in Manhattan. New York City police, many from ethnic, working-class communities that viewed Prohibition as an indictment against their way of life, did not care to assist the feds, nor were they inclined to obey the law themselves.<sup>95</sup> Even after the Anti-Saloon League, a voluntarist organization, successfully lobbied for the 1921 Mullan-Gage Enforcement Law, which squarely obliged the police to participate in the Prohibition project,<sup>96</sup> many police officers still dragged their feet or took bribes. Their lackadaisical attitude frustrated the dries, while their corruption enraged the entire citizenry, with the wets leading the charge that the threat to the rule of law was not worth the noble experiment.<sup>97</sup> It did not help matters that many officers of the Bureau of Prohibition were susceptible to bribery as well.

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<sup>88</sup> Noakes, “Domestic Tranquility,” 168.

<sup>89</sup> Noakes, “Domestic Tranquility,” 159.

<sup>90</sup> Lisa McGirr, *War on Alcohol*, 208.

<sup>91</sup> Commissioner of Internal Revenue, quoted in Post, “Prohibition,” 24.

<sup>92</sup> Some locales cooperated. Indeed, the Supreme Court’s first Prohibition car-search case, *Carroll v. United States*, came out of a joint investigation by federal agents and an officer from Michigan’s Department of Public Safety. See *Carroll*; see also Seo, *Policing the Open Road*, at \_\_\_\_.

<sup>93</sup> Calvin Coolidge, Third Annual Message (Dec. 8, 1925).

<sup>94</sup> James M. Doran, quoted in Post, “Prohibition,” 31.

<sup>95</sup> Michael A. Lerner, *Dry Manhattan: Prohibition in the City 72-75* (2007).

<sup>96</sup> *Id.* at 76-77.

<sup>97</sup> Lerner, *Dry Manhattan*, 82-83.

Without state and local participation, Prohibition was doomed to failure.<sup>98</sup> The New York example foreshadowed what might happen throughout the country.<sup>99</sup> In 1922, New Yorkers voted out Governor Nathan Miller, who had given them the Mullan-Gage Law, and replaced him with Al Smith, a committed “wet.”<sup>100</sup> The new governor quickly won the repeal of the state’s Prohibition enforcement statute, describing the Eighteenth Amendment as “not a command but an option.”<sup>101</sup>

Meanwhile, the Bureau quietly celebrated its distance from the “Great Experiment.” Any significant involvement with such a controversial and corrupting project would have stymied the fledgling agency, as it did for the Prohibition Bureau. The Bureau of Investigation’s role, the Wickersham Commission would report, was limited to “apprehending fugitives, who have violated the prohibition laws, and in following up interstate vehicle thefts, and impersonations of prohibition officers.”<sup>102</sup> One gets the sense that the Bureau’s efforts to widely circulate materials about what enforcement responsibilities it had during Prohibition was primarily to highlight the responsibilities it did *not* have.<sup>103</sup>

While the enforcement of Prohibition offered an example of what not to do, the Bureau’s Mann Act work provided a counterexample of a fruitful relationship with non-federal partners. The act’s passage in 1910 put “white slavery” at the top of the Bureau’s priorities and, importantly, justified more funds for the fledgling agency. The Bureau was, after all, the only federal police agency available to go after morals violations that did not go through the mails and that lacked a fiscal dimension. In early 1911, Attorney General Wickersham and Bureau Chief Stanley Finch assured the House Committee on Appropriations that the sensational reports about white slave trafficking were indeed true and that the Bureau was “endeavoring to make a very comprehensive investigation and enforcement” of the Mann Act.<sup>104</sup> Doing so, they went on to claim, “has cost [the Bureau] a very large amount of money,” and to continue their work, they

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<sup>98</sup> See Arthur C. Millspaugh, *Crime Control by the National Government* 54 (1937) (“Certain of the states failed to assume their share of the task and shifted the distasteful burden to the broad but slightly stooping shoulders of Uncle Sam. Prohibition leaders, misled by unwarranted faith in the omnipotence of federal enforcement, abandoned the localized methods which had gradually created a substantial temperance sentiment.”).

<sup>99</sup> See Julien Comte, “Let the Federal Men Raid”: Bootlegging and Prohibition in Pittsburgh, 77 *Penn. Hist.* 166, 174 (2010) (on police refusal to assist prohibition agents in Pittsburgh).

<sup>100</sup> Lerner, *Dry Manhattan*, 239-240.

<sup>101</sup> Alfred E. Smith, “The Governor’s Statement,” *New York Times*, June 2, 1923. See also Lerner, *Dry Manhattan*, 239-240. In 1928, Governor Smith ran as the Democratic candidate for president on an unabashedly repeal agenda. Although he lost to Herbert Hoover—the dries had successfully made Smith’s Catholicism an election issue—Smith’s support for repeal brought together a coalition of urban and working-class voters in numbers that nearly doubled those of the previous two Democratic candidates. According to Michael Lerner, Franklin Roosevelt’s election in 1932 “ended all talk of continuing the failed Prohibition experiment and marked the final defeat for a dry lobby.” After just nine days in office, FDR asked a special session of Congress to modify the Volstead Act. Lerner, *Dry Manhattan*, 301-303.

<sup>102</sup> National Commission on Law Observance and Enforcement, *Enforcement of the Prohibition Laws*, vol. 2 (1931), 223. Also cite APIB Annual Report.

<sup>103</sup> See Bureau booklet explaining what it does circulated in 1929 and thereafter (in Dropbox from “govt attic”).

<sup>104</sup> Noakes, “Domestic Tranquility,” 109.

argued, “we must have more money ... and a somewhat bigger force.”<sup>105</sup> Requests for more funding, however, proved more persuasive when they came from local and citizen groups, rather than federal bureaucrats. Later in the same year, after Wickersham reported that the Bureau had run out of funds allocated to Mann Act investigations, Finch reached out to morals reformers to lobby Congress for more money. The following letter-writing campaign prompted Congress to earmark an extra \$50,000 for white slavery cases, increased by another \$200,000 in 1913.<sup>106</sup>

But these infusions of money were still insignificant, and the Bureau relied on public-private partnerships and volunteerism.<sup>107</sup> After Finch became the special commissioner of the Mann Act,<sup>108</sup> he smartly established a vast network of local, part-time, and minimally compensated white-slave officers, usually local lawyers.<sup>109</sup> Together, they obtained more than 300 convictions between September 1912 and September 1913 alone.<sup>110</sup>

Support from police and communities also powerfully rebutted claims that the federal government was meddling in a presumptively local matter. An early Supreme Court challenge to the Mann Act “condemn[ed the Act] as a subterfuge and an attempt to interfere with the police power of the states to regulate the morals of their citizens,”<sup>111</sup> “an invasion of the reserved powers of the states.”<sup>112</sup> But the police themselves saw no troubling intrusion, just an opportunity for collaboration. At the 1913 IACP convention, President Richard H. Sylvester touted the extensive cooperation between the Bureau and locals. Police chiefs brought information about houses of “ill-repute” to Finch’s attention, then the feds took action. He noted that in Washington, DC, his own jurisdiction, “several” cases had been “disposed of by the United States authorities and the police have been foremost in bringing them to the front.”<sup>113</sup>

Scholars have pointed to the Mann Act, as well as the Volstead Act, as turning points in the federalization of law enforcement.<sup>114</sup> Yet one should avoid conflating legislation with enforcement. In fact, the enforcement of these new laws actually highlights federal dependency. Although support from citizens was crucial when Bureau officials went before Congress to justify its existence and request more funds, a perennially resource-strapped federal agency paid

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<sup>105</sup> *Id.*

<sup>106</sup> Pliley, *Policing Sexuality*, 88; Langum, *Crossing*, 52-55 (detailing funding shortfall and Finch’s efforts).

<sup>107</sup> Jessica R. Pliley, *The FBI’s White Slave Division: The Creation of a National Regulatory Regime to Police Prostitutes in the United States, 1910-1918*, 221, 230, in *Global Anti-Vice Activism, 1890-1950* (eds. Jessica R. Pliley, Robert Kramm & Harold Fischer-Tine 2016); see also Brian Balogh, *The Associational State: American Governance in the Twentieth Century* 26 (2015).

<sup>108</sup> 1912 AG Report, 48.

<sup>109</sup> Pliley, *White Slave Division*, 221, 230; Pliley, *Policing Sexuality*, 89; Langum, *Crossing*, 55-56.

<sup>110</sup> 1913 AG Report, 50.

<sup>111</sup> *Hoke v. United States*, 227 U.S. 308, 321 (1913).

<sup>112</sup> *Id.* The Court rejected the challenge.

<sup>113</sup> *Proceedings of the Annual Conventions of the Int’l Ass’n of Chiefs of Police, 1913-1920*, vol. III (reprinted 1971; June 1, 1913).

<sup>114</sup> See Stephen F. Smith, *Proportionality and Federalization*, 91 *Va. L. Rev.* 879, 897 (2005); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L.J.* 1135, 1142 (1995).

a price when it came to the control of its agenda. Without a sufficient force of its own, Finch's team depended on whatever information they received about potential Mann Act violations. Notwithstanding the Bureau's desire to focus on commercial prostitution and to avoid policing morals,<sup>115</sup> the "thousands of letters from neighbors, wives, husbands, fathers, and busybodies complaining of sexual irregularities" necessarily determined the Bureau's caseload.<sup>116</sup> Women seeking redress against lovers and husbands who spurned them, parents wanting to control daughters, and judgmental neighbors all saw the Mann Act as their tool. Given the drumbeat of these civilian complaints and calls from reformers demanding prosecution, it is not surprising that Mann Act cases skewed toward immoral behavior and less toward interstate prostitution rings that were harder to investigate.<sup>117</sup>

Dependence on others for information deprived the Bureau of agenda control, but the corollary was support for that agenda and for the Bureau itself. When this collaboration was not forthcoming—as Prohibition authorities discovered with liquor cases—no (realistically conceivable) amount of federal funding could have supported the agencies tasked with enforcement. Neither could the passions of a discrete contingent of crusaders sustain the Bureau's growth over a longer period. Once the white-slavery scare dissipated, the Bureau's appropriations stagnated.<sup>118</sup>

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<sup>115</sup> Pliley, *Policing Sexuality*, 99. In 1913, the Attorney General's office advised the U.S. Attorney in New Orleans that the Mann Act "does not apply to the ordinary case of illicit relations between a man and a woman, when interstate travel happens to be involved." The now infamous targeting of boxer Jack Johnson in 1913 ought to be seen not as typical for that year but as "a case of political targeting of a celebrity amid standard Jim Crow racial stereotyping." *Id.* at 102; see also Kelli Ann McCoy, *Claiming Victims: The Mann Act, Gender, and Class in the American West, 1910-1930s*, at 157 (PhD diss., Univ. of Cal. San Diego, 2010) (noting that the "Johnson prosecution was, undoubtedly, part of a concerted effort to establish a particular racial and gender order in the United States," but was not representative of the Mann Act cases brought). The Bureau also turned to the Mann Act when targeting a central figure in the 1920 Ku Klux Klan resurgence. Fred Cook, *The FBI Nobody Knows*, 124-26 (1964).

<sup>116</sup> Pliley, *Policing Sexuality*, 99. In her analysis of Mann Act casefiles, Pliley found that private citizens, usually complaining about "their own familial catastrophes and marital calamities," initiated most of the noncommercial cases. Hoover himself suggested figures between 50 and 70 percent. Pliley, *Sexuality*, 132. Noncommercial cases dominated the docket. McCoy's review of every available Mann Act case prosecuted in the Western United States from 1910 to the 1930s—about 1,200—found that "a large proportion of cases came to the attention of authorities because family members, friends, and neighbors turned in people who behaved in what they saw as an 'immoral' fashion." Kelli Ann McCoy, "Claiming Victims: The Mann Act, Gender, and Class in the American West, 1910-1930s," at 22 (PhD diss., Univ. of Cal., San Diego, 2010); see *id.* at 117; see also Kelli Ann McCoy, "Regulating Respectable Manliness in the American West: Race, Class, and the Mann Act, 1910-1940," 28 *Western Legal Hist.* 1 (2015).

<sup>117</sup> McCoy, *Claiming Victims*, 207 ("between 1910 and 1917, prosecutions progressed slowly and inconsistently along the path from commercial prosecutions—those cases most closely resembling 'white slavery'—to noncommercial prosecutions."); see also Langum, *Crossing*, 68 (noting pressure from "the public, zealous prosecutors, and the courts themselves" to expand prosecutions to include noncommercial violations involving consenting adults).

<sup>118</sup> Noakes, "Domestic Tranquility," 136.

The same patterns held during the Red Scare. The Armistice put an end to the Bureau's reliance on the APL<sup>119</sup> and was about to lead to a considerable reduction in force when a series of bombing attempts targeted administration officials, including the new Attorney General Palmer.<sup>120</sup> Notwithstanding the resulting hysteria, much of it manufactured, the Red Scare actually demonstrates the double-edged nature of the Bureau's security work. On one hand, such work did enlarge its sphere; helping the war effort and going after radicals after World War I made the Bureau seem indispensable to key national goals.

On the other hand, the Bureau would regularly find that political commitment to its national-security portfolio ebbed and flowed.<sup>121</sup> While the Bureau's readiness to take on politically sensitive assignments from the White House ensured presidential support (and would always be at odds with Hoover-centric stories of bureaucratic autonomy<sup>122</sup>), such responsiveness to explicit or implicit signals from its political masters did not provide a sustainable business model.<sup>123</sup> Indeed, the Bureau remained small throughout the Red Scare—which, strictly speaking was more a project of Attorney General, and presidential hopeful, Palmer than the ailing President Wilson.<sup>124</sup> From 1919 to 1920, staff at headquarters numbered only thirty-one, and only sixty-one special agents worked in the field full-time on radical activities.<sup>125</sup> Given their paltry numbers, they had to rely on local police forces in its many raids on strikers, anarchists, and communists.<sup>126</sup> By Fall of 1920, Republican President-elect Harding would declare that “too much has been said about Bolshevism in America,”<sup>127</sup> and budget strings were tightened.<sup>128</sup>

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<sup>119</sup> Regin Schmidt, *Red Scare: FBI and the Origins of Anticommunism in the United States, 1919-1943*, 84n5 (“The APL tried to continue its activities in 1919 but was ordered to stop by the new Attorney General A. Mitchell Palmer in April 1919.”).

<sup>120</sup> Schmidt, 149; see also Beverly Gage, *The Day Wall Street Exploded: The Story of America in its First Age of Terror, 179-178, 211-212* (2009) (on Palmer's background and reaction to the bombing of his home, and on Bureau theories).

<sup>121</sup> At the height of the Red Scare, the US Attorney in Western Washington asked Attorney General Palmer “to stop pursuing futile cases [against labor radicals] and concentrate on ‘the humdrum work developing and returning to this office evidence in the various criminal cases here prosecuted.’” Noakes, “Domestic Tranquility,” 168.

<sup>122</sup> Michael R. Belknap, “The Mechanics of Repression: J. Edgar Hoover, The Bureau of Investigation and the Radicals, 1917-1925,” 7 *Crime and Social Justice* 49 (1977); Athan G. Theoharis & John Stuart Cox, *The Boss: J. Edgar Hoover and the Great American Inquisition*, 105 (1988); Mark Ellis, *J. Edgar Hoover and the “Red Summer” of 1919*, 28 *J. Am. Stud.* 39 (1994).

<sup>123</sup> Schmidt, at 331 (“The presidents after the Red Scare relied increasingly on the resources of the Bureau of Investigation to keep them informed about social unrest, radical movements, domestic critics, and subversion from abroad.”); see also Kenneth O'Reilly, *Herbert Hoover and the FBI*, 47 *Annals of Iowa*, 46 (1983); Kenneth O'Reilly, “A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security,” 69 *J. Am. Hist.* 638 (December 1982).

<sup>124</sup> Theoharis & Cox, *The Boss*, at 55-57.

<sup>125</sup> Schmidt, 159.

<sup>126</sup> Williams, *Without Understanding*, at 122 & n185.

<sup>127</sup> Schmidt at 300-01; Theoharis & Cox, *The Boss* at 68 (“Hoover, lacking any independent political base, was forced for the time being to abandon the field of public antiradicalism.”).

<sup>128</sup> Schmidt at 156.

Given the fickleness of political winds and congressional ambivalence about the Bureau's work, especially during the civil-liberties backlash after the excesses of the slacker raids,<sup>129</sup> the Bureau's longevity—and appropriations—would have to be based on a steadier stream of work that not only mattered to everyday life for ordinary citizens but also transcended politics *du jour*.<sup>130</sup>

The institutional legitimacy of federal law enforcement drew on the mandate to enforce federal criminal laws. Yet this was also a period when, as historian Kimberly S. Johnson relates, efforts “to extend the reach of the national government within a disjointed, weak, and fragmented political system” required “administrative structures that would also ... reflect Congress's localist orientation, its limited capacity for oversight, and the national bureaucracy's limited ability to implement policy on its own.”<sup>131</sup> In the policing context, the local, state, voluntary, and private-sector filter through which federal efforts had to be refracted distorted federal priorities, save where the feds fully internalized service to others into their own work. The Dyer Act enforcement story is about an embrace of that service role—an embrace that would be a critical component of the Bureau's new informational role.

### III. Emergence of Bureau's Platform within Law Enforcement Ecosystem

#### A. Capacity Building through the Dyer Act

##### i. A Platform for Locals

The Bureau's experience with the Mann Act showed how its reliance on low-cost information from local enforcers and aggrieved citizens could deflect its agenda towards cases that (at least initially) were not a priority. The same informational dynamic played out very differently in Dyer Act cases, which became the solution to a pressing coordination problem. By using these cases to vault the jurisdictional hurdles that would otherwise impede the association of car, thief, and owner, the Bureau made its growing Dyer Act line of business into an adjudicative component of the larger informational platform that it was assembling within the criminal justice ecosystem. And it also obtained a sustainable way to serve state and local police, a service that would somewhat offset the bruises those enforcers suffered when the Bureau climbed on their backs. Indeed, if one is looking for a through-line from the 1920s to the

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<sup>129</sup> Noakes, “Domestic Tranquility,” 201. Laura Weinrib, *The Taming of Free Speech: America's Civil Liberties Compromise* (2016). Noakes, “Domestic Tranquility,” 223-224.

<sup>130</sup> See Richard Gid Powers. *Secrecy and Power* at 164 (noting that under Presidents Coolidge and Hoover, J.E. Hoover “probably would have been happy to join an attack on radicals if someone else with a strong political base had volunteered to lead it, but neither then nor after was he interested in leading an anti-Communist crusade all by himself”).

<sup>131</sup> Kimberly S. Johnson, *Governing the American State: Congress and the New Federalism, 1877-1929*, at 156 (2007).

criminal policies of the New Deal and beyond, it lay in the operational federalism that was the hallmark of Dyer Act enforcement, not the miserable failure of Prohibition.<sup>132</sup>

During hearings on the Dyer Act, legislators gave no thought to how it would be enforced. The closest they came to such a discussion was when Representative Newton noted that with the new law, “the Federal grand jury is empowered to investigate such larcenies.”<sup>133</sup> Indeed, once the Dyer Act was passed, its enforcement appears to have been an open question. Two months after enactment, the Automobile Underwriters Detective Bureau wrote to the attorney general inquiring “how a peace officer should proceed in making an arrest and prosecuting under this Act.”<sup>134</sup> Another insurance man wrote to the DOJ, “desirous of being sworn in as a special agent ... to serve without compensation for the purpose of running down ... thieves who have been ... transporting cars from one state to another.”<sup>135</sup> On the APIB’s part, its leaders were under the misapprehension that US Marshals were supposed to be pursuing Dyer Act cases, and so were dismayed at the “laxity” that “existed on the part of the Federal Authorities in the enforcement” of the new law.<sup>136</sup>

To make the most of their lobbying efforts, in 1921, APIB manager Rickards and an official from the Chicago Crime Commission met with Bureau Chief William Burns and his assistant J. Edgar Hoover “to discuss methods of closer co-operation between the Department of Justice Agents and the Association [and] more effectual enforcement of the National Motor Vehicle Theft Act.”<sup>137</sup> What came out of that meeting was clarification of the roles of the various stakeholders in Dyer Act cases—an example of how associations during this period of “New Federalism” “bridged the divide between bureaucrats and interest groups.”<sup>138</sup> The insurance cohort and local authorities would inform the feds about potential Dyer Act violations. Law enforcement—feds and locals both—would learn from insurance experts about investigatory methods. The APIB not only served as “a clearinghouse for information in connection with stolen automobiles,”<sup>139</sup> but it also published the “Reference Book” indicating where all the factory numbers and “secret identification numbers” were stamped on different car makes and models.<sup>140</sup> As the APIB reported in its 1922-1923 Annual Report, “the splendid work [the DOJ and the Bureau] are doing in connection with the enforcement of the National Motor Vehicle Act

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<sup>132</sup> While Lisa McGirr argues that Prohibition “constituted the formative years of the federal penal state,” McGirr at \_\_\_, it was more like an object lesson—of the perils of pursuing a controversial mission without local buy-in—rather than an origin point or way station.

<sup>133</sup> C.R. House 5475.

<sup>134</sup> H. M. Shedd to Attorney General (letter, January 29, 1920), RG 60, Class 26, Box 1, NARA.

<sup>135</sup> Frederick Lambert (Mutual Automobile Association) to DOJ (letter, January 24, 1920), RG 60, Class 26, Box 1, NARA.

<sup>136</sup> APIB, 1920-1921 Annual Report, 1. [pdf p 76]

<sup>137</sup> William Burns to Attorney General (memo, June 3, 1921), RG 60, Class 26, Box 1, NARA; see also APIB, 1920-1921 Annual Report, 1 (“arrangements were made for an intensified drive by the Federal Special Agents against the automobile thief”).

<sup>138</sup> Kimberly S. Johnson, *supra* at 6.

<sup>139</sup> APIB, 1920-1921 Annual Report, 2.

<sup>140</sup> Burns to Attorney General, June 3, 1921.



is most gratifying.”<sup>141</sup> It noted having “made a number of special requests of Director Wm. J. Burns,” and reported that “he has always gladly granted our requests and cooperated to the fullest extent.”<sup>142</sup>

For their part, local police did not hesitate to involve the feds, even in cases that could—and probably should—have been handled locally. Much criticism ensued when it became known that many of the Dyer Act defendants were juvenile joyriders, not sophisticated dealers in stolen cars.<sup>143</sup> An early prosecution in 1921 involved two Yale students arrested by the Hartford police after they stole a car and drove it to Binghamton, New York, for a “college dance.”<sup>144</sup> Many viewed these cases not as a criminal matter, but as a social welfare issue ill-suited for the federal government.<sup>145</sup> The attorney general testified before Congress in 1929 that the “Dyer Act is producing a great number of prisoners. There is a good deal to be said about the fact that many of those ought to be tried and punished under State law for theft. [But the states] have got in the habit of picking up every boy who takes an automobile across the State line and putting him into a Federal institution.”<sup>146</sup> A few years later in 1931, the Wickersham Commission identified 2,243 prisoners eighteen or under in federal custody, about 17.5 percent of Dyer Act charges,<sup>147</sup> and noted that “[i]n almost all cases the purpose in stealing cars was not to sell but to go somewhere.”<sup>148</sup> Representative Dyer was so troubled when he learned of “mere cases of joy-rides by young men” that he introduced a bill in 1930 to repeal his namesake Act.<sup>149</sup> Congress eventually passed a law mandating that in cases of “juvenile offenders” under the age of

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<sup>141</sup> APIB, 1922-1923 Annual Report, [pdf p13].

<sup>142</sup> *Id.*

<sup>143</sup> A 1924 L.A. Police report noted this “indication of a very serious social disease”: “Young boys see the finest of cars dashing about them on every hand and they lose control of themselves and become abnormal in their desire to be themselves the drivers of cars.” J.B. Thomas, *Conspicuous Depredation: Automobile Theft in Los Angeles, 1904 to 1987*, at 12 (1990) (quoting article by Dr. Edwin P. Ryland, published in a report submitted to the L.A. City Council by August Vollmer, July 14, 1924).

<sup>144</sup> “Yale Students Suffer for Motor Theft,” *New York Times*, March 1, 1921, at 10.

<sup>145</sup> Not everyone bemoaned this use of the Dyer Act. See Bart Campbell, “My Car’s Gone,” *Wash. Post*, November 4, 1928 (celebrating the change that Dyer Act prosecutions gave the government to “remake” young car thieves in juvenile facilities).

<sup>146</sup> Appropriations Bill for 1931, Seventy-First Congress, Second Session, December 1929, at 3.

<sup>147</sup> National Commission on Law Observance and Enforcement (Wickersham Commission), vol. 6, Report on the Child Offender in the Federal System of Justice, 34 (1931).

<sup>148</sup> *Id.* at 52. One letter lodged an angry grievance for three boys who, “in spirit of adventure,” stole a car in Portland, Oregon, and drove to Washington State. They were charged under the Dyer Act; two were acquitted, but one, a seventeen-year-old boy “was sentenced to an outrageous term of six years in the state institution at Anamosa Iowa.” J. MacDermott to Attorney General (letter, August 9, 1924), RG 60, Class 26, Box 1, NARA.

<sup>149</sup> Patch, Buel W. (1932). Proposed expansions of federal police activity. Editorial research reports 1932, vol. 1 (Washington, DC: CQ Press), retrieved from <http://library.cqpress.com/cqresearcher/cqresrre1932040100> Federal Experience Under Dyer Stolen Automobile Act <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1932040100#H2>; AG memo to USAs.

twenty-one, the United States attorney “is authorized to forego the prosecution of such person” and “surrender him” to state authorities.<sup>150</sup>

Local officials often passed juvenile cases on to the feds, in part, because courts ruled that joyriding—which did not have the necessary intent “to permanently deprive the owner of his car”—did not amount to a crime under state larceny laws.<sup>151</sup> As late as 1959, a legal commentator observed that this was “peculiarly a state problem,” and so the Dyer Act, which was “sufficiently omnibus as to embrace the act of ‘joyriding,’” was used instead.<sup>152</sup> Some states responded by expanding the statutory definition of larceny or by creating a new criminal offense of “operating a car without the consent of the owner.”<sup>153</sup> But bringing prosecutions under federal law had one more advantage: as Attorney General Mitchell noted in 1930, juvenile joyriders, “upon their arrests, admit the theft and make no difficulty about prosecution.”<sup>154</sup> The fear of federal authority probably prompted many of these guilty pleas. And notwithstanding claims—echoing those made about the Mann Act—that Congress had meant to target only professional thieves, joyriding offenders continued to dominate the caseload.<sup>155</sup>

As an evidentiary matter, it was also often easier to prove a violation of the Dyer Act with its straightforward stolen car elements than the accompanying state crime like robbery. This may explain why many local officials were more than happy to pass along any case involving a car that crossed a state border. For instance, in July 1931, Chanute, Kansas, police killed one man, wounded two, and captured a fourth, Lemuel Hawkins—identified as “a former member of the Kansas City Monarchs baseball team”—after the officers tried to arrest the four “in connection with a holdup earlier in the day at Ottawa, Kan[sas].”<sup>156</sup> Hawkins was charged and convicted solely for violating the Dyer Act and sentenced to two years at Leavenworth.<sup>157</sup>

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<sup>150</sup> Act of June 11, 1932, P. L. 169, 72nd Cong., 1st Sess., Chap. 243; see also 72 Cong. Rec. 2494 (1930); Jerome Hall, *Federal Anti-Theft Legislation*, 1 L. & Contemp. Prob. 424, 428 (1934); L. B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors’ Discretion*, 13 L. & Contemp. Prob. 64, 85 (1948); Hoover signing statement, <http://www.presidency.ucsb.edu/ws/index.php?pid=23125>

<sup>151</sup> Leonard D. Savitz, *Automobile Theft*, 50 J. Crim. L. & Criminology 132, 132 (1959), citing *Impson v. State*, 47 Ariz. 573 (1930).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Mitchell to Luhning (memo, January 29, 1930), RG 60, Class 26, NARA [v.2 74/129].

<sup>155</sup> Garrett Heyns, *The Detainer in a State Correctional System*, 9 Fed. Probation, No. 3, at 13, 13 (1945) (Michigan Dept. of Corrections Director notes “in practically all the cases where Dyer Act warrants have been filed against inmates in Michigan prisons, the car thefts were of the joyriding type and not at all professional in character”).

<sup>156</sup> “Kansas Bandit Slain,” *St. Joseph New-Press*, July 20, 1931, <https://news.google.com/newspapers?id=z0tkAAAAIBAJ&sjid=TnUNAAAAIBAJ&pg=3101,4406166&dq=lemuel-hawkins&hl=en>

<sup>157</sup> [http://pendergastke.org/search-solr/field\\_theme\\_term/corruption-1003/field\\_correspondence\\_series/lemuel-hawkins-inmate-file-10601?sort=field\\_year&order=asc](http://pendergastke.org/search-solr/field_theme_term/corruption-1003/field_correspondence_series/lemuel-hawkins-inmate-file-10601?sort=field_year&order=asc) [check link] On his release, Hawkins, who had been a standout player in the Negro National League, was shot and killed in a robbery in Chicago, in 1934.

While the Dyer Act thus facilitated “pretextual prosecutions”—where the charge bore only a passing connection to the reason for bringing it<sup>158</sup>—its main value arose when the police in one locality apprehended someone with a car stolen from another locality, or when the police in a theft victim’s state needed help from the recovering state. As Hoover—promoted to director in 1924—explained, even simple Dyer Act investigations generally required “interstate inquiries, which the Bureau makes through its various field offices.”<sup>159</sup> He continued:

The state authorities would be extremely handicapped ... by lack of investigative authority extending from one locality to another, by lack of funds requisite to subpoena witnesses from one locality to another, by the necessity of resorting to a complicated system of removal hearings, extradition writs and other legal necessities which it would be necessary to invoke and by what I feel sure would be a very positive disinclination on the part of various local authorities to incur the expense and trouble to properly enforce the Act where local individuals or individuals of local prominence were not involved.<sup>160</sup>

In short, federal prosecution substituted for interstate information sharing and clunky extradition procedures.<sup>161</sup> Even diligent police chiefs sometimes had to rely on the feds given the coordination challenges that local law enforcement faced. At an IACP conference in 1927, Chief J. W. Higgins of Buffalo, New York, complained that although his department assiduously compiled records on stolen and recovered cars, “other cities are not co-operating with us to the extent we co-operate with them.”<sup>162</sup> Higgins then went on to tell of a case that could not be made against a bi-coastal car thief until a federal agent drew on the impressive records of the Buffalo Police Department.<sup>163</sup>

In time, local protocols instructing officers to reach out to the feds whenever they recovered an out-of-state stolen car became common.<sup>164</sup> When, in 1927, a Martinsburg, West

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<sup>158</sup> Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecutions*, 105 Colum. L. Rev. 583, 584 (2005).

<sup>159</sup> Hoover to Asst. Atty. Gen. Luhling (memo, December 18, 1929), RG 60, Class 26, Box 2, NARA [pdf 73/129].

<sup>160</sup> *Id.*

<sup>161</sup> See John H. Jackson, “What’s Happening to the Car Stealing Racket?,” 7 J. Am. Insur. 7, 7 (1930) (“Theoretically, the apprehension of automobile thieves is a state matter, but by making the transportation of a stolen car over a state line a federal crime, and thereby putting the matter in the hands of federal officials, the necessity of co-operation between local police and of extraditing the criminal who has been arrested in a foreign state has been eliminated.”).

<sup>162</sup> J. W. Higgins, *The Theft and Recovery of Automobiles*, 34 Procs. Annual Conventions of IACP 83, 85 (1927).

<sup>163</sup> *Id.*

<sup>164</sup> “State Joins U.S. Dept. in Auto Theft Cases,” *Hartford Courant*, July 28, 1921 (reporting that state motor vehicle commissioner committed to notify the federal bureau of investigation “whenever an arrest is made in Connecticut for the theft of a motor vehicle in another state and federal agent will be assigned to the case.”).

Virginia, constable found an abandoned car with Florida plates, he scribbled a note to the Justice Department, which got passed to Hoover, who, in turn, assured the assistant attorney general for the Criminal Division that the matter would receive the Bureau's full attention.<sup>165</sup> The constable appears to have found that car by himself, but Justice Department correspondence indicates that local recoveries were often spearheaded by insurance company representatives accompanied by local police, who then passed the case on to the feds.<sup>166</sup> In fact, just about all Dyer Act cases came from state and local officials, and there were many. Rickards reported that in 1921, of the 10,505,660 cars in the country, 60,145 had been stolen, and 43,664 had been recovered.<sup>167</sup> Far from intruding on local matters, Dyer Act cases amounted to the federal collection and packaging of information for the benefit of all concerned.

## ii. What the Bureau Got in Return

In a 1922 House appropriations hearing, Chief Burns noted with dismay that the increasing number of Dyer Act cases reflected "a marked tendency on the part of State authorities to shift [] responsibility on[to] Federal authorities."<sup>168</sup> Regardless what his superior thought about this trend, J. Edgar Hoover welcomed it. In 1924, when Burns was forced to resign because of his involvement in the Teapot Dome scandal, the APIB's annual report noted that it "received excellent co-operation from Mr. Wm. J. Burns, Former Director, but the present Director, Mr. J. E. Hoover, is more intensely interested in the enforcement of the National Motor Vehicle Theft Act and fully realizes the effect of automobile thievery on general crime conditions."<sup>169</sup>

Hoover collaborated not simply because locals sought federal help; he also understood the benefit to the Bureau. The automobile and insurance industries both closely followed Dyer Act cases and maintained up-to-date statistics on cars stolen and recovered, the monetary values

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Not all states passed the buck. In 1926, explaining why no Dyer Act prisoners came from certain states, the superintendent of prisons noted, "That means only this, gentlemen, not that there are no motor vehicles being stolen, but that the State of Massachusetts, for instance, is rigidly enforcing its local law, and, therefore, we get no prisoners under the national motor vehicle theft law." Appropriations Bill for 1927, Sixty-Ninth Congress, First Session, January 1926, at 287 (testimony of Luther C. White, superintendent of prisons). Other states trumpeted their own efforts. A 1929 magazine article commented, "One reason why Milwaukee recovers ninety-five per cent of all its stolen automobiles is because it maintains exhaustive records of such stolen property in the Identification Bureau as well as in the traffic department." Ruel McDaniel, *Wisconsin Gets Her Men*, *North Amer. Rev.* 744, 746 (June 1929).

<sup>165</sup> Correspondence involving Constable Harmon, Assistant AG Luhring, and Hoover between May 23, 1927, and June 14, 1927, RG 60, Class 26, NARA.

<sup>166</sup> William De Groot (EDNY U.S. Attorney) to Attorney General (letter, October 14, 1926), RG 60, Class 26, NARA [23/136].

<sup>167</sup> E. L. Rickards to John Crim (Assistant Attorney General) (letter, June 3, 1921), RG 60, Class 26, Box 1, NARA.

<sup>168</sup> Appropriations Bill for 1923, Sixty-Seventh Congress, Second Session, March 1922, at 128 (testimony of Director Burns); see also *id.* at 262 (Asst. Atty. Gen. Holland notes, "as Federal laws are extended, so that offenses which were formerly punishable by the States are punishable under Federal law, it is very noticeable that State officials sidestep their responsibility and put such responsibility on the Federal Government.").

<sup>169</sup> APIB, 1923-1924 Annual Report, [pdf p26].

of those numbers, as well as the total amount of fines and sentences imposed. Testifying at a House appropriations hearing in 1926, Hoover mentioned having “just received” an annual report from the Theft Committee of the National Automobile Underwriters Conference, which highlighted how the most recent fine and recovery data “prove conclusively that the Department of Justice, Bureau of Investigation, is enforcing the national motor vehicle theft act and your committee firmly believes that this arm of the Government is serving the public 100 percent.”<sup>170</sup> Hoover was certainly not shy about deploying this broad-based industry support—and the steady stream of statistics—during congressional appropriations hearings. Nor was he even original. Before his disgrace, Attorney General Daugherty had in 1922 touted both “the value of the stolen motor vehicles recovered by the Bureau of Investigation” and the “[e]xcellent cooperation” between DOJ agents, “peace officers throughout the United States,” and “the insurance companies writing auto theft insurance.”<sup>171</sup> The relationship between bureaucratic actors, private beneficiaries, and congressional overseers in this space was starting to look a lot like the “iron triangles” that would develop in other regulatory spaces.<sup>172</sup>

The support of local law enforcement was foundational. When, in 1929, Hoover misinterpreted an inquiry from his boss about whether Dyer Act cases should be prosecuted in state courts, he foresaw “considerable embarrassment to the Department” should the suggestion be implemented.<sup>173</sup> He warned “that should the Bureau discontinue its investigative activities under this Act, considerable criticism would be developed from large insurance interests as well as automobile and law enforcement interests throughout the country.”<sup>174</sup> While the legend of Hoover as grand manipulator might argue for reading the “*would be developed*” language as an unsubtle reference to what Hoover himself would do, the police’s reliance on the feds in these cases, as well as the interests of the insurance industry, counsel taking this more as an easy prediction. The 2,123 Dyer Act convictions obtained in 1929 constituted 53.75% of the 3,950 Justice Department convictions (including 457 under the Mann Act).<sup>175</sup> Not only would this focus on Dyer Act cases largely continue until World War II, but, as shown here, the Bureau’s proportionate commitment to these cases would remain steady as its budget significantly increased.

**Table 1. Breakdown of Total Bureau Convictions.**<sup>176</sup>

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<sup>170</sup> Appropriations Bill for 1927, Sixty-Ninth Congress, First Session, January 1926, at 108. See also “Dyer Law Nips 272 Prisoners in a Year,” *Detroit Free Press*, January 20, 1921 (federal achievements in first year of Dyer Act touted in report submitted to the directors of the National Automobile Dealers’ Association in Chicago).

<sup>171</sup> Attorney General Annual Report, 1922, at 70-71.

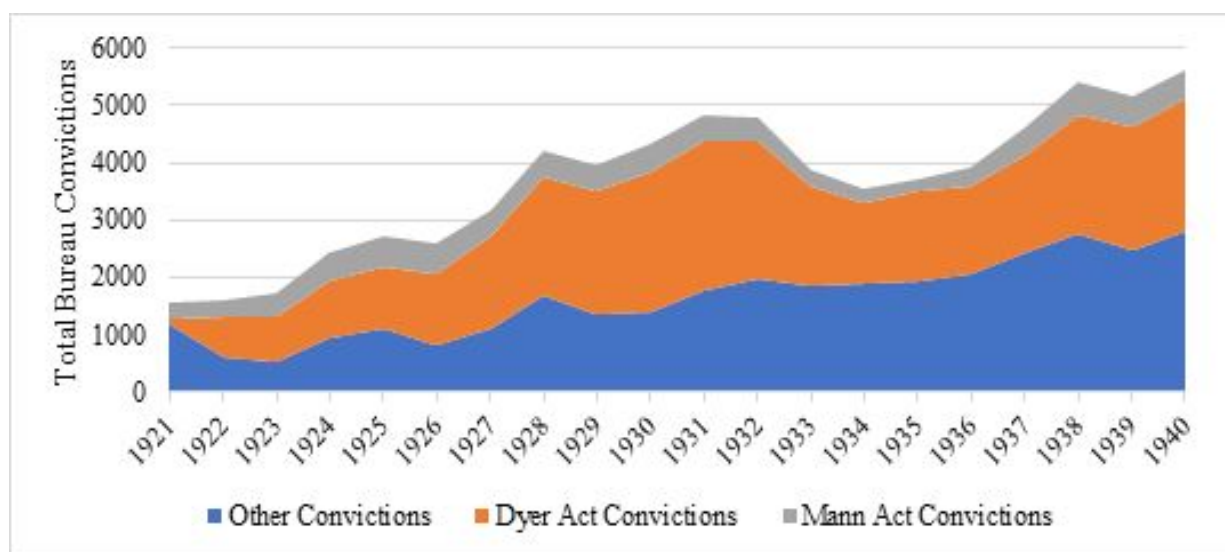
<sup>172</sup> Francis E. Rourke, *American Bureaucracy in a Changing Political System*, 1 *J. Pub. Admin. Res. & Theory* 111, 118 (1991).

<sup>173</sup> Hoover to Luhning (memo, December 18, 1929), RG 60, Class 26, NARA [pdf v.2 p.73].

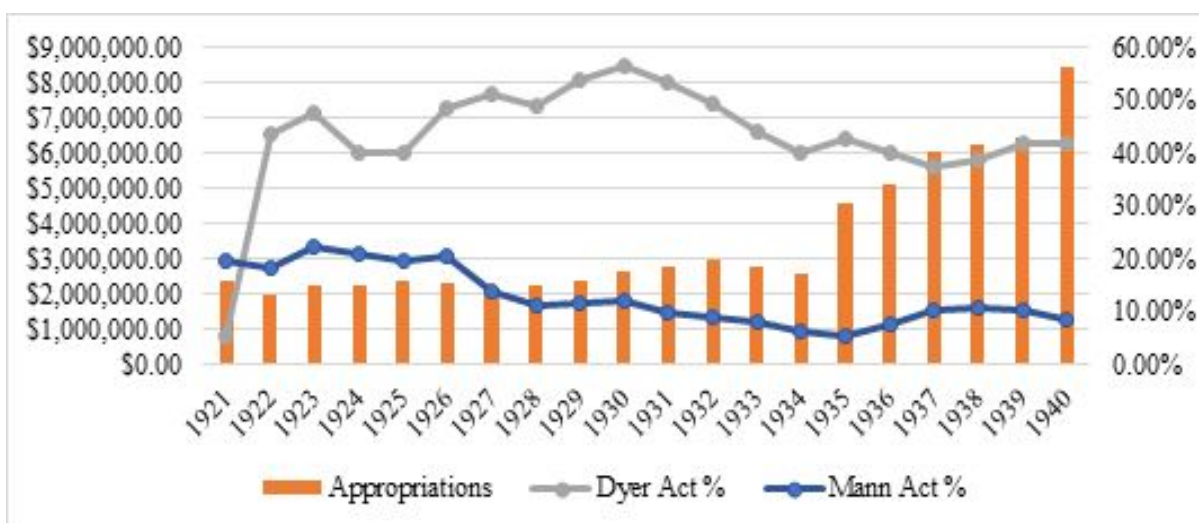
<sup>174</sup> *Id.*

<sup>175</sup> Attorney General Annual Report, 1929,

<sup>176</sup> Data was taken from Attorney General Annual Reports 1921 – 1940. For years before 1928, the Bureau reported convictions by sentence amounts imposed rather than numbers convicted. Conviction numbers for years 1921 - 1927 were therefore taken from either statements in appropriation bills or by calculating a sentences imposed-to-conviction ratio from future years.



**Table 2. Bureau Appropriations Compared to Percentage of Dyer and Mann Act Convictions.<sup>177</sup>**



It wasn't that the Bureau lacked other matters crying out for its investigative intervention. As David Grann recounts in *Killers of the Flower Moon*, in the spring of 1923, when the Osage Tribal Council appealed to the Justice Department to investigate a growing spate of murders targeting its members, Chief Burns dispatched agents to pursue desultory inquiries, largely at the tribe's expense.<sup>178</sup> On becoming director, Hoover decided "to dump the case back on state authorities in order to evade responsibility for the failure."<sup>179</sup> He was stymied, however, by the

<sup>177</sup> For conviction numbers see *supra* note 159. Appropriation amounts were taken from Attorney General Annual Reports 1921 - 1940.

<sup>178</sup> David Grann, *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI* (2017).

<sup>179</sup> *Id.* at 110.

outcry that ensued when the outlaw that agents had freed from an Oklahoma prison to assist in their investigation robbed a bank and killed a police officer.<sup>180</sup> The Bureau did conduct an investigation, but with an inadequacy that Grann makes clear in sad detail. In contrast, Dyer Act cases were manageable matters with the promise of total success.

It was through the Bureau's service to commercial interests and local law enforcement that the fledgling agency not only justified its existence but could also expand its capacity.<sup>181</sup> An assistant director at the Bureau explained in 1930 that "the bureau's representatives in various sections of the country are dependent in very many instances upon the good will of sheriffs' offices and other law-enforcement officials for cooperative support in the conduct of investigations."<sup>182</sup> Hoover further elaborated that the Bureau's close relationships with local police saved money; instead of sending an agent from Dallas all the way to the Panhandle to check on a subject and his "reputation" as part of a routine investigation, an agent could simply wire the police chief or sheriff who would do it for the Bureau "without any cost to us."<sup>183</sup>

In 1935, a columnist close to Hoover disclosed how the "service" aspect of the Dyer Act contributed to the expansion of the Bureau's own capabilities:

Before the passage of this act, the run of bureau cases was tied tightly to the business of the Federal Government: there was little opportunity to be of assistance to State and local law-enforcement agencies. The new law widened tremendously the scope of activities. True, if a man robbed a bank, that was not the bureau's business since the robbery of even a national bank [] was not a Federal crime until less than two years ago. But if that robber stole a car during that holdup and crossed a State line, he then became a fugitive from Federal justice. ... A Federal chase for a violator of the national vehicle theft act has often led to the solution of a local mystery. A motivating crime is found, the theft of the car being the act of the moment, impelled by something quite different—usually the desire to escape from some other law violation. The Federal agency therefore frequently becomes an assisting agency to the enforcement bodies of the Nation, later withdrawing from the case if the State charge is the more serious.<sup>184</sup>

In this account, the broad enforcement discretion federalization afforded the Bureau became a licence to help, not encroach on state and local domains.

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<sup>180</sup> Id. at 110-111.

<sup>181</sup> In 1929, the Bureau employed 136 people at headquarters (not including the Identification Division), and had a field force (scattered in 30 field offices) of 460, of which 285 were agents and 73 accountants. Albert Langeluttig, *Federal Police*, 146 *Annals Am. Acad. Pol. & Soc. Sci.* 41, 42, 52 (1929).

<sup>182</sup> H. Nathan (Asst. Dir., Bureau of Investigations) to Director (Bureau of Prisons) (letter, August 9, 1930), in *Appropriations Bill for 1932* [check], Seventy-First Congress, Third Session, December 1930, at 179-180.

<sup>183</sup> Hearing on Appropriations Bill for 1934, at 92 (1932).

<sup>184</sup> Courtney Ryley Cooper, "10,000 Public Enemies: Chapter VI. Chief of the Man-Hunters," *Wash. Post*, July 20, 1935, at 24. For Cooper's relationship with Hoover, see Powers at 196-200.

The low profile of most car thefts meant that they usually did not spark turf wars. Since the Bureau generally pursued Dyer Act cases at the behest of local authorities, there was little risk that “federal intervention” would raise local hackles. What the Bureau did could more accurately be described as federal “processing,” with local police initiating the inquiry and the Bureau passing the gift-wrapped cases back to local authorities (perhaps in another jurisdiction) to prosecute. Hoover noted in 1929 that “in some instances we find that prosecution is instituted in State Courts under local Statutes, particularly where the case holds some local interest or where important witnesses are readily available without the State incurring a large expenditure.”<sup>185</sup>

Happy to let the locals take the credit in these cases, the Bureau just wanted the limelight in higher profile cases that also required considerable local assistance.

### iii. Public Enemies and the War on Crime

The high-profile cases were the ones that captured the nation’s attention and provoked the public into calling for greater federal intervention. Even President Herbert Hoover, the stalwart defender of local rule, could not ignore these demands. In 1930, during Prohibition’s final years, he announced that the federal government would provide reinforcements in “an intensified cooperative drive against racketeering in Chicago and elsewhere.”<sup>186</sup> This announcement prompted newspapers to report that “the nation wars on racketeering,” indeed, it was “more than a war, it is a revolution ... against gangster and hoodlum rule.”<sup>187</sup>

Anxieties about crime reached fever pitch in 1932, when Charles Lindbergh’s twenty-month-old son was kidnapped from his own home.<sup>188</sup> Hoover and Attorney General Mitchell directed all federal police agencies, but especially the Bureau, to “cooperate to the utmost with the State authorities,” who were led by New Jersey State Police Colonel Schwarzkopf (the future general’s father).<sup>189</sup> But the Bureau could not do much. For one thing, the only federal jurisdictional hook available at the time was the Dyer Act, and Mitchell noted that there was no reason yet to believe that the culprits had driven a stolen vehicle across state lines. Second, Schwarzkopf rebuffed Director Hoover’s offers to help by refusing to give the Bureau fingerprint evidence for testing.<sup>190</sup> After the baby’s body was found two months after the kidnapping, the public demanded a national response.<sup>191</sup>

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<sup>185</sup> [?] to Luhning (memo, January 29, 1930), RG 60, Class 26, NARA [pdf v.2 p.71/129].

<sup>186</sup> “Topics of the Day: The Nation Aroused to Smash the Racketeer,” *Literary Digest*, December 6, 1930.

<sup>187</sup> *Id.*

<sup>188</sup> See Kathleen Frydl, “Kidnapping and State Development in the United States,” 20 *Stud. in Am. Pol. Dev.* 18, 24 (2006).

<sup>189</sup> “Federal Aid in Hunt Ordered by Hoover: Cooperation of All Government Agencies Offered to States to Find Kidnappers,” *New York Times*, March 2, 1932.

<sup>190</sup> Claire Bond Potter, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* 113 (1998). See also James D. Calder, *The Origins and Development of Federal Crime Control Policy: Herbert Hoover’s Initiatives*, 200 (1993).

<sup>191</sup> See R. L. Duffus, “Kidnapping: A Rising Menace to the Nation,” *New York Times*, March 6, 1932, XX1; Buel W. Patch, “Proposed Expansions of Federal Police Activity,” 1 *Editorial Research Reports* 231, 231 (1932).



Congress promptly considered several bills to make the transportation of kidnapped persons over state lines a federal offense.<sup>192</sup> Mitchell was hesitant about this expansion of federal jurisdiction, confessing that he could not recommend such legislation in light of his department's budget limitations.<sup>193</sup> He also pointed out that if such a law had been on the books in the Lindbergh case, the public would have demanded federal involvement, local authorities would have then relaxed their own efforts, and the government would have expended manpower and money "only to find out at the end that no federal crime had been committed as there had been no interstate transportation."<sup>194</sup> But given the national uproar, Mitchell yielded and advised President Hoover not to veto the kidnapping bill, stating that he had "no objection to such a measure if Congress desires to pass it."<sup>195</sup>

The Lindbergh case and aftermath confirmed that high-profile cases could generate public support for greater federal action, and the subsequent Roosevelt administration seized on the string of high-profile kidnappings and bank robberies when launching its war on crime. Indeed, banner headlines punctuated Roosevelt's first year in office, in 1933. In the June "Kansas City massacre," a group of notorious gangsters ambushed law enforcement authorities and left an agent dead during an attempt to free one of their own in federal custody.<sup>196</sup> In July, "Machine Gun" Kelly kidnapped an oil tycoon for ransom.<sup>197</sup> Later that year, John Dillinger and his crew killed the Lima, Ohio, sheriff during a jailbreak, launching a nationwide manhunt for the outlaw.<sup>198</sup>

Responding to this breakdown in law and order, Roosevelt's attorney general, Homer Cummings, rolled out a "twelve point plan for crime prevention."<sup>199</sup> To justify this legislative package, Cummings couldn't help but take a swipe at local officers and even lawyers who failed to maintain standards of professionalism and entered into "an unholy alliance" with racketeers.<sup>200</sup> But he focused most on the "twilight zone," the area in "between the jurisdictions of the Federal

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<sup>192</sup> See Patch, "Proposed Expansions," 232-233.

<sup>193</sup> Patch, "Proposed Expansions," 231-232; Mitchell was not the only one with qualms about tasking the feds with these kidnapping cases. The House Judiciary Committee initially proposed targeting kidnappings with a federally deputized task force of state and local officers, with authority from their governors to go beyond state lines, and with the expense born by the state. Like several other proposals for horizontal cooperation, this one also got nowhere. Horace L. Bomar, Jr., "The Lindbergh Law," 1 *Law & Contemp. Probs.* 435, 436-37 (1934).

<sup>194</sup> Federal Justice, 479.

<sup>195</sup> "Federal Aid."

<sup>196</sup> Potter, 2; see Robert Unger, *The Union Station Massacre: The Original Sin of J. Edgar Hoover's FBI* (1997) (finding massive holes in the standard FBI account of the ambush and arguing that the agent was likely killed by friendly fire).

<sup>197</sup> Kathleen J. Frydl, *Kidnapping and State Development in the United States*, *Stud. in Am. Pol. Dev.* 18, 23-24 (2006).

<sup>198</sup> S.F. Cowley, Memorandum for the Director, *Murder of Sheriff Jesse Barber*, Oct. 24, 1933, Dillinger Gang pt. 1 of 30, p. 43.

<sup>199</sup> "Attorney General Cummings Outlines Crime Prevention Program Over CBS," *Columbia Broadcasting System*, April 19, 1934, at 2.

<sup>200</sup> *Id.*

and State Governments” where “the predatory criminal takes hopeful refuge.”<sup>201</sup> This was, of course, a problem that IACP leaders had identified even before the twentieth century. Assuring those wary of federal government overreach, Cummings avowed that the “Federal Government has no desire to extend its jurisdiction beyond cases in which, due to the nature of the crime itself, it is impossible for the States adequately to protect themselves.”<sup>202</sup>

To bolster support for the war on crime, the administration also brought the high-profile cases home to the average “John Public.” In July 1933, Roosevelt’s chief political advisor, Louis Howe, published an article in the *Saturday Evening Post* with a headline announcing that “Uncle Sam Starts after Crime,” which explained that the “average citizen at least [was] beginning to consider the organized criminal as a personal danger to him and to his family.” During the economic depression, kidnapping for ransom was making “every man with a comfortable income uneasy lest he, personally, be the next victim.”<sup>203</sup> “John Public” was now beginning to understand that “the kidnapper cannot be eliminated without eliminating the gangster, and the gangster cannot be eliminated without eliminating the racketeer.”<sup>204</sup>

Notwithstanding the heightened attention on Public Enemy cases, Dyer Act cases remained the foundation for the Bureau’s business. Juxtaposing the crime war’s discourse and operational realities highlights how the Bureau managed to project an outsized image of its capacity relative to its small size. The Bureau pursued some noted Bad Guys and, to the extent possible, maintained control over those cases, both to ensure success and to credibly claim credit. But “to the extent possible” is a critical caveat, for the Bureau could make its high-profile cases only with considerable cooperation from the same local authorities it wanted in the shadows. The Bureau’s assiduous work on its “service” lines of business, particularly the Dyer Act, would more than offset these informational and resource “withdrawals” from its local counterparts. Also offset were the Bureau’s occasional forays into vice and corruption that occasionally implicated local police and raised the hackles of their congressional protectors,<sup>205</sup> or into civil rights enforcement, which once started in 1940, was largely limited by “state action” concerns to police officers.<sup>206</sup>

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<sup>201</sup> Id.

<sup>202</sup> Id. at 3.

<sup>203</sup> Louis M. Howe, “Uncle Sam Starts after Crime,” *Saturday Evening Post*, July 29, 1933.

<sup>204</sup> Id.

<sup>205</sup> At a 1940 appropriation hearing, Hoover had to explain to a somewhat hostile Florida Representative Millard Caldwell (soon to be governor) that the Bureau was investigating actual federal crimes when it scrutinized Miami Beach conditions and found that certain police agencies “were not interested or sincere in the enforcement of law.” It was so bad that local cops had been barred from talking to his agents. Dept. of Justice Appropriation Bill for 1941, Hrgs. Subcom. of Comm. on Appropriations, 66th Cong., 3d Sess. 167-168 (1940).

<sup>206</sup> Elliff, at 66-67. In 1942, cautioning against a civil rights inquiry into a police brutality case, Hoover wrote to the Assistant to the Attorney General James Rowe, Jr. that the Atlanta Police Department was “very cooperative” with the Bureau’s Atlanta field office, and “I feel this additional investigation will undoubtedly be misinterpreted and possible rupture the friendly relationship that has been established with that Department.” Id. at 142. In 1952, Hoover cautioned agents not to comment disfavorably on their civil rights investigations of police. Richard Gid Powers, at 327. In 1961, one former agent reported hearing of efforts within the Bureau to “go easy on

Dyer Act cases provided an inexhaustible platform for sustained collaboration in which locals got a large piece of the action whenever they were up for it. In a 1938 appropriations hearing—a year when Dyer Act cases produced 2,093 out of 5,420 convictions (with Mann Act convictions a distant second, at 576)<sup>207</sup>—Hoover brushed aside the suggestion that the Bureau was working on cases that were “not really proper matters” for the federal agency. He explained that “if we find that the local authorities are diligent and energetic we let them take the case,” which was “true of most of the large cities.”<sup>208</sup> As a result, the Bureau was able to “direct our efforts only to those cases in which we have primary jurisdiction or where the local authorities cannot or will not function.”<sup>209</sup> The celebrated newspaperman Damon Runyon noticed these priorities in a 1939 column. Having just read the Bureau’s annual report for 1937-1938, he remarked, “What interests us as much as anything else is the way those G-fellows go after automobile thieves.”<sup>210</sup> The Dyer Act cases provided the institutional ballast to offset any potential disruption to the Bureau’s relationship with locals when it swooped in to take kidnapping cases, “alienat[ing] many local cops by always taking full credit for any successful case and blaming local police for any failures.”<sup>211</sup>

Law enforcement’s pursuit of the infamous gangster John Dillinger illustrates the fine line that Hoover had to walk between showcasing his Bureau’s effectiveness and appeasing locals. When Tucson, Arizona, police apprehended Dillinger in January 1934, Hoover publicly “expressed his satisfaction with the performance of Tucson and county peace officers.”<sup>212</sup> The president of a “scientific protection firm” congratulated Hoover on the success of “your men” and voiced his “suspicion” that Hoover had directed “the credit” to the local police, noting: “I’m sure this will pay you many times in securing the co-operation of the local police departments with your men.”<sup>213</sup> Hoover agreed, careful not to correct the writer’s misimpression, that “this

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local police because of the need for their cooperation in other Bureau matters.” Fred J. Cook, *The FBI Nobody Knows*, 23 (1964).

<sup>207</sup> Annual Report of the Attorney General, 1938, 175-76.

<sup>208</sup> Hearings on Appropriations Bill for 1939, Seventy-Fifth Congress, Third Session, December 1937–January 1938, at 166-67; see also Jane Perry Clark, *Interdependent Federal and State Law as a Form of Federal-State Cooperation*, 23 Iowa L. Rev. 539, 557 (1938) (noting the “close cooperation” between the Bureau and local authorities in Dyer Act cases).

<sup>209</sup> *Id.*

<sup>210</sup> Damon Runyon, *The Brighter Side*, Apr. 4, 1939, at 19.

In 1935, out of 3,717 federal convictions, 1,597 were for Dyer Act violations, 79 for bank robbery, and 40 for kidnapping. Annual Report of the Attorney General, 1935, at 144-45. In 1936, out of 3,905 federal convictions, 1,570 were under the Dyer Act, with 73 bank robbery convictions, and 31 kidnapping. Annual Report of the Attorney General, 1936, at 133-34.

<sup>211</sup> Robert Alvin Waters & Zack C. Waters, *The Kidnapping and Murder of Little Skeegee Cash: J. Edgar Hoover and Florida’s Lindbergh Case*, 16 (2014).

<sup>212</sup> J. Edgar Hoover Lauds Work of Police, Jan. 26, 1934 Tucson Daily Citizen, clip in FBI files, fbi.vault Gang pt. 3 p. 49.

<sup>213</sup> Letter, President of Federal Laboratories, to Director Hoover, Jan. 26, 1934, vault.fbi Dillinger Gang, pt. 3, p. 15.

practice on the part of newspapers will aid materially in securing the cooperation of the local and Federal authorities.”<sup>214</sup>

Then in March, Dillinger escaped from the Crown Point County Jail in Indiana with help from corrupt local officials.<sup>215</sup> Hoover promptly mobilized the Bureau to pursue Dillinger, who had committed multiple Dyer Act violations—a fact always noted in the case heading. This massive federal effort, and the headlines it garnered, came just as Congress was considering Roosevelt’s crime legislative package and doubtless sped its passage.<sup>216</sup> It was not the only conspicuous targeting of a Public Enemy at this politically important time. On April 6, Cummings announced that his Department was entering the search for Bonnie Parker and Clyde Barrow because “federal assistance in a co-operative effort” was necessary “to suppress this kind of crime.”<sup>217</sup>

This political backdrop (and perhaps also concerns about local corruption) made federal branding even more important in the hunt for Dillinger and his gang. When Special Agent Melvin Purvis asked headquarters whether “he should solicit the assistance of local law enforcement” when conducting raids in the case, Hoover sent instructions that “such raids should be conducted by Division Agents exclusively whenever possible,” with outreach to locals only if “absolutely necessary.”<sup>218</sup> Still, even with around thirty-eight agents assigned full-time,<sup>219</sup> the Bureau would not have been able to track Dillinger without considerable assistance from local police, like those in Kentucky, where he visited soon after his escape,<sup>220</sup> and in Port Huron, Michigan, where an under-sheriff was killed in the course of apprehending a man who had escaped with Dillinger.<sup>221</sup>

Maintaining tight Bureau control over the Dillinger manhunt—for both political and operational reasons—while not aggrieving state and local police could be challenging. In April, IACP’s president quietly chided Hoover’s media-hogging and noted press reports of Hoover’s “constant and devoted search for Dillinger.”<sup>222</sup> “While your faithful agents are making every effort to apprehend this man,” he allowed, “we likewise are making a similar effort,” he pointed

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<sup>214</sup> Letter, Director Hoover to John Young, Pres. of Federal Laboratories, Feb. 2, 1934, vault.fbi, Gang pt. 3, p. 16.

<sup>215</sup> Potter at 145.

<sup>216</sup> Kenneth O’Reilly, *A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security*, 69 J. Am. Hist. 638, 642-43 (1982).

<sup>217</sup> Potter, at 103. Hoover, however, did not treat the Bonnie and Clyde case seriously, and no federal agents were involved when former Texas Rangers and sheriff’s deputies ambushed the couple on May 23, 1934—the same day the Moley report was released. See Burrough, at 347; Potter at 103; Barrow and Woman Are Slain by Police in Louisiana Trap, N.Y. Times, May 24, 1934, at 1.

<sup>218</sup> Memorandum to the Director, S.P. Cowley, Mar. 7, 1934, fbi.vault Gang at p. 4, p. 95.

<sup>219</sup> Burrough, at 347 n.\*.

<sup>220</sup> Case Report, Harry Pierpont et al., Mar. 15, 1934, fbi.vault Gang pt.4 p. 97.

<sup>221</sup> Letter From Wm. Larson, SAC, to Director Hoover, Mar. 20, 1934, fbi.vault, Dillinger Gang pt. 6 at 111.

<sup>222</sup> Letter from Chas. A. Wheeler, Pres. IACP, to Dir. Hoover, April 6, 1934, fbi.vault Dillinger Gang pt 10, p. 146.

out. He ended the letter by guaranteeing that the “entire force” of the IACP would be “at YOUR disposal.”<sup>223</sup> For its part, the Bureau took pains to shoot down a press report “to the effect that this Division has not cooperated with [local] law enforcement officials” because it had “caused considerable embarrassment particularly because it is not true . . . and secondarily because it has caused collaborators of the Division to feel offended and hurt.”<sup>224</sup>

While the Bureau’s service work for state and local enforcers somewhat offset its failure to credit their collaboration in the pursuit of Famous Bad Guys, the wide (and carefully tended) public support for the Bureau’s exploits required that such collaboration never appear to be withheld. Later in April 1934, a flurry of internal memos followed a newspaper report quoting Senator Copeland of New York, chair of the Senate Racketeering Committee, as noting “a pathetic failure of co-operation between Federal, State and local authorities’ in the Dillinger case.”<sup>225</sup> Immediately, as Hoover told the attorney general, local police throughout the Midwest were put “on the defensive” when reporters started asking “where they have failed to cooperate.”<sup>226</sup> The head of the Michigan State Police, Oscar Olander, had told reporters of vainly offering help to the Bureau in apprehending Dillinger. It turned out that Olander, who was close with Copeland, had been told by his men that, when they asked to accompany agents and a sheriff on the raid, an agent had said: “Tell the State Police to go to Hell. When the State Police are wanted they will be called upon.” Olander later explained that reporters had asked him about Dillinger’s presence in Michigan and that Olander had to admit ignorance. So he was put in “an embarrassing position” and made the statements to defend himself after the Copeland remarks, not to criticize the Bureau. Olander assured the Bureau that not only was he a big fan, but when a Michigan congressman had tried to get him to make a “statement against the [Bureau],” he had refused.<sup>227</sup>

After a bloody failed attempt to capture Dillinger in late April, Hoover demanded that “Public Enemy #1” be given priority over all other matters.<sup>228</sup> Intergovernmental relations were still critical though. When Indiana Governor McNutt told a Bureau official that his “chief desire is to have a member of the State Police present when Dillinger was captured,” the official assured him that the Bureau would call “whenever possible.” But the official took care to substitute the director of public safety, whom the Bureau knew and trusted, for the state police captain whom the governor had suggested (and who had been on Dillinger’s trail for almost a year).<sup>229</sup> Ultimately, it was another Indiana force, the East Chicago police, that provided the

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<sup>223</sup> Id.

<sup>224</sup> S.P. Cowley, Memorandum for the Director, Apr. 26, 1934, Dillinger Gang pt. 21, p. 45.

<sup>225</sup> Lack of Police Co-operation in Dillinger Case Is Scored, Washington Star, Apr. 24, 1934.

<sup>226</sup> Memorandum for the Attorney General from Director Hoover, Apr. 26, 1934, Dillinger Gang pt. 26, at 37-39.

<sup>227</sup> S.P. Cowley, Memorandum for the Director, April 27, 1934, Dillinger, Gang pt. 22, at 211-12.

<sup>228</sup> See Borroughs, at 292-322; Telegrams from Hoover, Apr. 30, 1934, to New York and Chicago offices, Dillinger Gang pt. 22, at 139-41.

<sup>229</sup> Office of Director, Memorandum, May 4, 1934, Dillinger Gang pt. 25 at 198; see Burrough at 94-97 (on Matt Leach); Fred Cook at 181 (on how Captain Leach “found himself completely front out” of a pursuit in which the Bureau’s refusal to coordinate with local police nearly led to a shootout between them).

critical information. They had an informant in contact with Dillinger, and two officers were eager to help if they could “work with” the Bureau.<sup>230</sup> (They may also have been looking for reward money; they did seek it thereafter.<sup>231</sup>) Dillinger was ambushed at the Biograph Theater days later.<sup>232</sup> Even as the Bureau sought to manage its relationships with state police agencies, dependence on local police was virtually non-negotiable.

#### iv. Implications

Historians have pointed to Roosevelt’s administration as a major turning point in the federal government’s increasing involvement in the traditionally local sphere of crime and punishment. There were, indeed, a busy few years. In 1934, Congress passed nine crime bills, built Alcatraz prison, and formally authorized Bureau agents to carry guns and make arrests for the first time. To demonstrate the federal government’s attention to the crime problem, national lawmakers in 1935 rechristened the Bureau of Investigation. It became the *Federal* Bureau of Investigation.<sup>233</sup>

But examining what, exactly, FDR’s war on crime entailed suggests far more continuity with the 1920s. Before coming to the White House, while New York Governor, he had bemoaned the national government’s “dangerous tendency” “to encroach” on “State supremacy” in criminal matters.<sup>234</sup> And Columbia law professor Raymond Moley--tasked by Roosevelt’s advisor Louis Howe with devising a criminal justice policy -- would note in his 1934 report to the president that “it is very important not to permit the citizen or his local government to get the idea that the suppression of crime will be entirely assumed by Federal enforcement machinery.”

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What really separated Roosevelt’s crime policy from Hoover’s was that its interventionist moves, however modest, were of a piece with a larger ideological program to promote national

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<sup>230</sup> Potter sees this as part of a pattern during this period, with the Bureau “competing with local police to get information first and providing local officers with incentives to circumvent their own commanders and report directly to federal agents.” Potter, at 179-80.

<sup>231</sup> Telegram to Director, July 22, 1934, Dillinger Part 2 of 3 at 19; see Potter at 160. For a suggestion of even more insidious motivation on the part of the East Chicago police, see Burrough at 415-16.

<sup>232</sup> Burrough recounts the story in wonderful detail. See Dillinger Slain in Chicago, N.Y. Times, July 23, 1934, at 1.

<sup>233</sup> See Stolberg, *Twilight Zone*, 394; Kathleen J. Frydl, *supra* at 20; Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *Crime and Justice* 377, 387-388 (2006).

<sup>234</sup> Address before the Conference of Governors, New London, Conn., July 16, 1929, *Public Papers of the Presidents of the United States*.

<sup>235</sup> “Moley’s Report to Roosevelt on Law Enforcement Measures,” *New York Times*, May 23, 1934. Howe, who while favoring an “American Scotland Yard,” nonetheless recognized “the broad bar of a fundamental constitutional provision in regard to police powers.” Howe explained that a national police force presented “one of the ways in which the Federal Government can help, not by usurping any of the state police powers, but coming ... upon the invitation of the local authorities.” Howe, “Uncle Sam,” 71; see also Stolberg, *Twilight Zone*, 399

solutions for addressing what had hitherto been considered local matters.<sup>236</sup> Yet even as the Roosevelt administration envisioned a robust national state to tackle the problems of modern society, it understood that the war on crime could not shore up the Bureau's—and J. Edgar Hoover's—power at the expense of local law enforcement.<sup>237</sup>

Further suggesting continuity is that little in Roosevelt's program was new, with much of it having been introduced in Congress, with broad support, under President Hoover. For instance, the House in 1932 considered bills on racketeering (Cummings' point no. 1), stolen property (point no. 2, which was essentially an extension of the Dyer Act), and the interstate shipment of firearms (point no. 11).<sup>238</sup> Point no. 3 concerned two bills "strengthening and extending the so-called Lindbergh kidnapping statute" that Congress had passed in 1932. The purpose of these bills was to clarify when, exactly, federal agents could join a kidnapping investigation since the interstate nature of a particular crime often would not be discovered until after the conclusion of a case; Congress wanted to specify that "if a kidnapped person is not released after three days, interstate transportation shall be presumed."<sup>239</sup> Even the new crimes—like the prohibition on the robbing of federal banks (point no. 5) and killing federal officers (point no. 6)—were "modest and logical improvements" as one historian described them, and certainly not designed to grow the federal bureaucracy.<sup>240</sup> As Moley clarified in his report, there was "no intention that the United States Government should supersede State authorities in these cases, but the bill is to give Federal authorities the power to cooperate with local forces when necessary."<sup>241</sup> Indeed, Cummings pointedly refused to support a new push for an anti-lynching law. While his explanation was that "lynching was a local matter," his real concern was fear that support would jeopardize southern support for other criminal legislation.<sup>242</sup>

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<sup>236</sup> See Bengtson, 395 ("any acknowledgement of the nation's 'crime problem' as an urgent and legitimate federal concern could only have been regarded as part of a more general and certainly welcome expression of federal interest in a whole range of problems - widespread unemployment, failed economic and political institutions, social conflict, and personal hardship among the - then afflicting the body politic."); Williams, *Without Understanding*, 325 ("Attorney General Cummings and others used the Bureau's achievements to allay liberal and radical criticism that the government had failed to find adequate solutions to other pressing social problems, most notably economic distress and displacement brought on by the Great Depression."); Frydl, "Kidnapping," 16 ("It is worth noting the coterminous advance of the social welfare state with the security state; the threat of economic peril alongside perceived or real threats to basic security provided a shared rhetorical context that legitimized and extended the case for federal power in general.").

<sup>237</sup> Attorney General Cummings also understood that crime fighting would have to remain primarily a local responsibility. When the chief of his criminal division publicly proposed a plan to place all municipal and state law enforcement officers under the US Justice Department, Cummings promptly demanded his resignation without consulting the president. See Stolberg, *Twilight Zone*, 400-402; Bengtson, 458.

<sup>238</sup> Compare "Cummings Outlines," 3-4, with Patch, "Proposed Expansions."

<sup>239</sup> Moley report.

<sup>240</sup> Stolberg, "Twilight Zone," 403.

<sup>241</sup> Moley report.

<sup>242</sup> Elliff, at 67-68; see also Jeffrey A. Jenkins, Justin Peck, and Vesla Weaver, *Between Reconstructions: Congressional Action on Civil Rights, 1891-1940*, 24 *Stud. Am. Pol. Dev.* 57, 79-82 (2010) (on efforts by Northern Democrats to pass anti-lynching legislation in 1934).

Perhaps most revealing is point no. 12—on a “law authorizing agreements between two or more States for mutual cooperation in the prevention of crime”—which was first introduced in the House, also back in 1932. In explaining the purpose of his bill, Representative Sumners pointed out that there was “just one of two things” that the federal government could do in response to crimes carried out across state lines: either send criminal functions “back to the States” or “reconcile ourselves to be governed by a great Federal bureaucracy.”<sup>243</sup> As a national legislator, he had “seen enough slobbering over these criminals and heard enough maudlin sentimentality about them.” He wanted the federal government to retreat from criminal matters, and his way out was to “give two sovereign States the privilege of entering into any agreement they want to, to protect their citizens against people who ought to be shot on sight.”<sup>244</sup> A critical part of FDR’s legislative package was thus a law giving blanket congressional consent to interstate compacts, as required by Article 1 of the Constitution, “for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies” as a measure to avoid expanding the federal law enforcement apparatus.<sup>245</sup>

Although the Administration’s promotion of interstate compact suggests a desire to increase state-to-state enforcement collaborations unmediated by federal authorities, it probably had mixed feelings on the matter, or at least it didn’t put serious money on the table to that end. Conspicuously absent from its program were the sort of financial grants-in-aid to the states that would have given states—and perhaps their subdivisions—more programmatic control, even if conditional.<sup>246</sup> This was a significant road not taken. As Jon Teaforde has insightfully observed, the federal government can empower states within a policy space by making them—not localities—the unit of engagement for funding and regulatory purposes.<sup>247</sup> Indeed, Karen Tani has shown precisely how that happened during the New Deal with respect to federal welfare policy.<sup>248</sup> Yet the converse played out for criminal law enforcement during this period, no parallel effort to erode “the bedrock of localism.”<sup>249</sup>

It may be that the Administration’s failure to elevate states as counterparties was overdetermined. Criminal law enforcement’s dependence on local connections and their closely held information will tend to pull authority down to the lowest levels even in the most

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<sup>243</sup> Sumners statement, 75 Cong. Rec. 8423 (1932).

<sup>244</sup> *Id.*

<sup>245</sup> 48 Stat. L. 909, Crime Control Compact Consent Act of 1934 (now 4 U.S.C. § 112 (2003)).

<sup>246</sup> See Arthur C. Millspaugh, *Crime Control by the National Government*, 49-50 (1937) (Brookings Institution Report) (noting that the “federal government has not yet made use of financial grants-in-aid to assist the states in their criminal-law enforcement work, but has sought by other means to strengthen, co-ordinate, and supplement state effort.”); Donald C. Stone, *Reorganization for Police Protection*, 1 *Law & Contemp. Probs.* 451, 456-57 (1934) (suggesting that a federal grant-in-aid system might be developed but counseling against leaving standard setting to the more “political” state governments); Potter at 187 (suggesting Hoover helped kill grant proposals); see also Richman, *Violent Crime* (on subsequent federal grant programs).

<sup>247</sup> Jon Teaforde, *The Rise of the States* (2002).

<sup>248</sup> Karen M Tani, *States of Dependency* (2016).

<sup>249</sup> See Martha Derthick, *Keeping the Compound Republic*, at 17 (noting how “[n]othing that had occurred before midcentury diminished the localism of police departments or [] schools” neither of which had been “the beneficiary (or victim) of federal aid”).



centralized national policing regimes,<sup>250</sup> and America's commitment to localized criminal justice ran (and continues to run) deep. Moreover, state police forces were underdeveloped latecomers in the 1930s, and in these early years, most states authorized their forces to enforce only traffic and highway safety laws.<sup>251</sup> Ideological concerns about centralized police also applied to state police, and the states' domain in the criminal enforcement space was largely limited to providing penal laws and prisons. In the South, concerns that governors—perhaps more attentive to the state's reputation beyond—would unduly intrude on local white supremacy norms only reinforced resistance to state centralization.<sup>252</sup>

Yet not only did the Administration fail to materially promote interstate coordination, it also likely retarded it. Even though the Constitution's Extradition Clause provided for the return of fugitives from one state to another,<sup>253</sup> the "asylum" state's oft-abused discretion<sup>254</sup> and the perceived "inefficiency" of extradition processes rendered the procedure largely defunct. Rather than wait for modernizing reforms (which would have required considerable state legislation), the Administration proposed the Fugitive Felon Act, which essentially provided a substitute for extradition.<sup>255</sup> Under the new regime, the Bureau would use federal charges to obtain jurisdiction over fleeing felons and then turn them over to the local authorities seeking them. The Bureau having played its keystone role, federal charges would thereupon be dismissed.<sup>256</sup> In the 1938

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<sup>250</sup> See Otwin Marenin, *Police Performance and State Rule: Control and Autonomy in the Exercise of Coercion*, 18 *Comparative Politics* 101, 107-09 (1985) (on the "work of policing").

<sup>251</sup> See at \_\_; H. Kenneth Bechtel, *State Police in the United States: A Socio-Historical Analysis* (1995); Lynn G. Adams, *The State Police*, 146 *Annals Amer. Acad. Pol. & Soc. Sci.* 34 (1929).

<sup>252</sup> See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *Yale J.L. & Feminism* 31, 41 (1995) (noting how after Alabama Governor Bibb Graves used the State Law Enforcement Department to investigate and prevent lynchings between 1926 and 1930, the Department became an issue in the 1930 gubernatorial election, Graves lost, and his successor abolished the Department).

<sup>253</sup> U.S. Const., Art. IV, sec 2.

<sup>254</sup> Henry S. Toy & Edmund Shepherd, *The Problem of Fugitive Felons and Witnesses*, 1 *Law & Contemp. Probs.* 415, 419 (1934); see William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 *Cornell L.Q.* 337, 339-40 (1938-1939) (noting that because of the discretionary authority allowed to governors under current extradition procedures, "there is a temptation to ignore its requirements and forcibly return the fugitive to the offended state, frequently with the open connivance of the officers of the state where he is found").

<sup>255</sup> Attorney General Cumming testified:

One of the most difficult problems which local law-enforcement agencies have to deal with today is the ease with which criminals are able to flee from the State to avoid prosecution.... The [Fugitive Felon Act] is considered the most satisfactory solution to this problem, which the States have never been able to solve effectively. This [Act] . . . will not prevent the States from obtaining extradition of roving criminals, but the complicated process of extradition has proved to be very inefficient.

H.R. Rep. No. 1458, 73rd Cong., 2d Sess. (1934); S. Rep. No. 2253, 73rd Cong., 2d Sess. (1934), quoted in Samuel L. Bare, III, *Federal Assistance in the Enforcement of State Criminal Law*, 17 *Wash. & Lee L. Rev.* 161 (1960); see also Brevard E. Cihfield & Mitchell Wendell, *Crime Control and the Uniformity of Criminal Laws*, 42 *J. Crim. L. & Crim.* 571, 574 (1952).

<sup>256</sup> Bare, *supra* at 164-65.

“Handbook” produced by the Interstate Commission on Crime—an organization established in 1935 to facilitate state-to-state crime control—an assistant to Attorney General Cummings celebrated how the Fugitive Felon Act solved the “problem” posed by the “archaic character of the state’s own extradition law” or “lack of funds” that prevented the transfer of a fugitive even in cases where the “distant” state tried to cooperate.<sup>257</sup> The federal statute was well received, even in southern states. It enabled, for instance, Georgia authorities to obtain custody of an African American who fled to New York to avoid being lynched, despite New York Governor Lehman’s refusal to “even entertain” an extradition request unless the charges against the man were reduced.<sup>258</sup> Indeed, complaints about the discretionary aspects of state extradition processes and their general inadequacies would continue for decades.<sup>259</sup>

The Fugitive Felon Act thus further solidified the Bureau’s position as the federal government’s prime negotiator of its relationships with state and local—but mostly local—enforcers. This arrangement was affirmed at the 1934 Crime Conference, the Roosevelt administration’s big event, intended to demonstrate its seriousness about crime. Attorney General Cummings’ opening remarks set the agenda for the gathering: “Just how far the work of the federal department should go and just what the form of interrelation between the agencies representing the state and federal governments should be,” he posited, was “one of the crucial questions which faces us in this Conference.”<sup>260</sup> Earl Warren, then district attorney of Alameda City, California, maintained that “there must be an integration of all law enforcement activities” and that he “wish[ed] to see this done, not by transferring our local police powers to the Federal Government nor by shifting the responsibility for maintaining law and order to Washington, D.C. but by bringing about a degree of cooperation and coordination of activity.”<sup>261</sup> Bureau Director Hoover could not agree more. The “best and only kind of a National Police which America will tolerate,” he insisted, was “local officers with a knowledge of local conditions and local criminals” who performed their duties with “the support of the Federal Government.”<sup>262</sup>

Notwithstanding the limited federal role that all the Crime Conference participants agreed was important to uphold, the war on crime did enlarge the Bureau’s domain over criminal matters. Whether pursuing its own enforcement goals or helping locals to solve their own cases, the Bureau would need a lot more agents. In his report, Moley suggested that “the field investigating force should immediately be increased to not less than 1,000.”<sup>263</sup> Hoover himself

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<sup>257</sup> Gordon Dean, Recent Extensions of Federal Criminal Law, 111, 113, in Interstate Comm’n on Crime, *The Handbook on Interstate Crime Control* (1938).

<sup>258</sup> Lindbergh Law Invoked to Win Extradition of Lynching Fugitive, *N.Y. Times*, Mar. 10, 1939, at 21.

<sup>259</sup> Tom Cameron, Extradition for Crimes Poses Special Problems, *L.A. Times*, Jan 9, 1956, at 15.

<sup>260</sup> Procs. AG’s Conference on Crime, Dec. 10-13, 1934 at 4 (Cummings). Another point of continuity: The Conference refused to considering lynching as part of the nation’s crime program—a failure that sparked picketing by Howard University students. CITE; see also Christopher Waldrep, National Policing, Lynching, and Constitutional Change, 74 *J. Southern Hist.* 589 (2008).

<sup>261</sup> Earl Warren, 322.

<sup>262</sup> 1934 Conf. Procs. at 25-26.

<sup>263</sup> Moley report.

informed the attorney general that he would need an additional 200 special agents and 70 accountants, which would nearly double the Bureau's existing manpower.<sup>264</sup>

Such expansion would still leave the Bureau unable to actually enforce the growing number of federal criminal statutes without considerable assistance from state and local authorities. Yet the very lack of statutory attention to constrained federal capacity increased the Bureau's effective authority. Moley recognized, for instance, that proposed legislation "practically assumes [federal] jurisdiction in all cases of bank robbery or burglary" and that this was "a very considerable extension of Federal responsibility."<sup>265</sup> Although the statute did not actually say so, Moley envisioned that it applied only to "professional criminals who move from State to State and in many instances operate on a national scale," and "not [] to local criminals."

<sup>266</sup> But the Bureau's experience with white slavery and auto theft cases suggested that this distinction would not always be so clear-cut. Moley admitted as much when he concluded that ensuring the proper division of local and federal responsibilities would have to "be found in an attempt to operate the bill" and "depend upon the wisdom with which its enforcement is attended."<sup>267</sup> That "wisdom" would be the discretion of Hoover and his Bureau, sometimes with guidance from the Attorney General, to determine when to intervene and which cases to leave to the locals, all the while nurturing the collaborative relationship that he had been developing for years. And the exercise of this discretion would remain racialized. Even when the NAACP appealed to Roosevelt to use the federal kidnapping law against two southern lynchings in which the victims had been transported over state lines, Cummings advised the president that doing so would be inappropriate absent more authority from Congress.<sup>268</sup>

## B. National Identification and Information Division

By creating opportunities to package criminal information for the shared benefit of the Bureau and local enforcers, Dyer Act prosecutions helped ensconce the relatively new federal agency in the national policing ecosystem. Further establishing the Bureau was a more expansive stewardship of criminal information -- both identification data and the crime statistics that ultimately became the Uniform Crime Reporting system. The collection and management of both not only gave the Bureau a further opportunity to serve and promote the interests of local departments, but put the Bureau at the forefront of an effort to centralize and order information about crime and criminals (and many non-criminals) and to maximize the returns from that data. The Bureau's leadership in this endeavor enhanced its nationwide status by burnishing its claims to professionalism and expertise,<sup>269</sup> and implicitly highlighting the inadequacies of local

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<sup>264</sup> Stockham, 142.

<sup>265</sup> Moley report.

<sup>266</sup> Id.

<sup>267</sup> Id.

<sup>268</sup> Elliff, at 69-70; see also Michal R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South* 19 (1987). Eventually, in 1951, the Civil Rights Section revisited its constrained reading of the kidnapping act, and successfully used it against Carolina Klan members who kidnapped two African Americans. Elliff, at 302; *United States v. Brooks*, 199 F.2d 336 (4th Cir. 1952).

<sup>269</sup> See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L. Rev. 995, 999 (2019) (exploring how "starting in the 1950s, judges came to rely on the promise of police expertise — the notion that

knowledge. It also gave the Bureau a central role in a larger “legibility” process -- to use James Scott’s powerful term about a state’s commitment to “map” its terrain and people<sup>270</sup> -- that was foundational to the state-building during this period.

In 1921, twenty years after it unsuccessfully proposed “a National Bureau of Criminal Identification” to Congress, the IACP tried again, this time with the Bureau’s assistance. After meeting with IACP representatives, Chief William Burns announced his intention to establish a national fingerprint registry.<sup>271</sup> Two years later, the IACP “unanimously adopted” resolutions to transfer its records—all 138,000 of them—to the DOJ before Congress had even authorized the federal agency to collect them.<sup>272</sup> Burns, also impatient with congressional inaction, unilaterally ordered all records from the federal prison in Leavenworth to be transferred to Washington.<sup>273</sup> Its hand forced, Congress held hearings on the matter the following year.

Concerns about centralized policing continued to loom large during the 1924 hearings. A national criminal identification database seemed too close to the registration of citizens maintained by centralized states on the continent.<sup>274</sup> Several members of Congress also raised questions about the cost of setting up such an agency—figures ranged from \$56,000 to \$200,000—and, more importantly, which department would house it.<sup>275</sup> Simmering underneath were questions about whether the project would lead to a national police force and how it would affect the federal-state relationship on law enforcement matters, particularly at a time when National Prohibition was straining that relationship.

Unsurprisingly, Chief Burns wanted the new division within the DOJ. The Justice Department was in charge of Leavenworth, which was already exchanging prisoner information with local police departments.<sup>276</sup> It made sense, then, that the DOJ would also handle the exchange of fingerprints for the entire country. Accordingly, Burns calculated that \$56,000 would be enough to expand Leavenworth’s operations, and he did “not think” that he would “be asking for an increase year by year.”<sup>277</sup>

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trained, experienced officers develop rarefied and reliable insight into crime — to expand police authority in multiple areas of the law).

<sup>270</sup> James Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998).

<sup>271</sup> Lowenthal, 370.

<sup>272</sup> 1924 Congressional Hearing, 27, 35.

<sup>273</sup> Lowenthal, 372-373. In 1909, Attorney General Charles Bonaparte unsuccessfully tried to convince Congress to transfer Leavenworth’s identification records to Washington, DC. Sankar diss., 255.

<sup>274</sup> Lowenthal, 370. Tocqueville once contrasted the lack of surveillance systems in the United States with France’s system of internal passports and residential registrations, as well as a centralized reporting system of criminal convictions. Sankar diss., 118-119 (citing Tocqueville, *The Old Regime and the French Revolution* (New York 1951), p.61).

<sup>275</sup> 1926 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1926-1930*, vol. 5 (New York, 1971), 9, 76.

<sup>276</sup> *Id.* at 76.

<sup>277</sup> *Id.*

But New York City Police Commissioner Enright vehemently objected. As Simon Cole reports, New York “had a history of exploiting its position as the nation’s most populous state to try to win control of the country’s criminal information infrastructure, always to the annoyance of the IACP.”<sup>278</sup> And if the NYPD would not be in charge, neither should the feds be. In 1924, Enright avowed that his department “will never file a criminal record with any central bureau” unless it was “under police control.”<sup>279</sup> Now Enright wanted “an independent bureau,” and “to start an organization” completely from scratch would require at least \$200,000.<sup>280</sup> When Congressman Hersey informed him that “a separate bureau is rather obnoxious to us at Washington,” Enright responded, “We feel this way regarding the Department of Justice.”<sup>281</sup> If Congress did not want to create a new federal bureaucracy, then Enright suggested—in a canny effort to avoid making the Justice Department the beneficent party in so many transactions in the criminal informational economy—“putting it under the Department of the Interior.”<sup>282</sup> But this made no sense, Representative Dyer pointed out, because the Interior Department did not enforce criminal laws.<sup>283</sup> Enright countered that the project “must rest on good will” to receive cooperation—that is, information—from local departments.<sup>284</sup> And “good will will not flow ... from our police departments” to the DOJ, he insisted.<sup>285</sup> When Hersey pressed him, Enright answered that there was “not very much friendship between the Department of Justice and most of the police departments of our country.”<sup>286</sup> According to Enright, opposition to the DOJ had “always existed.”<sup>287</sup> Enright feared that oversight of the information exchange would be a slippery slope to the usurpation of local control. “We want a medium,” Enright explained, “but we do not want it in the place it might lead to control.”<sup>288</sup>

Notwithstanding Enright’s claims -- which were colored by his department’s ambitions and its opposition to the federal Prohibition mission<sup>289</sup> -- most police departments did not harbor

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<sup>278</sup> Simon Ablon Cole, *Manufacturing Identity: A History of Criminal Identification Techniques from Photography through Fingerprinting*, Ph.D. dissertation, Cornell University, at 332 (1998); see also Simon A. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (2002).

<sup>279</sup> Cole *Manufacturing Identity*, at 336 (quoting Course of Instruction: Given Under Auspices of the International Police Conference,” *Journal of Criminal Identification* 1,6 (1924)).

<sup>280</sup> 1926 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1926-1930*, vol. 5 (New York, 1971), 9, 76 at 1, 9.

<sup>281</sup> *Id.* at 5.

<sup>282</sup> *Id.* at 7.

<sup>283</sup> *Id.* at 10.

<sup>284</sup> *Id.* at 6, 7.

<sup>285</sup> *Id.* at 6.

<sup>286</sup> *Id.* at 5.

<sup>287</sup> *Id.* at 10.

<sup>288</sup> 1924 Congressional Hearing, 11.

<sup>289</sup> When a congressman asked another police chief about whether “the enforcement of the eighteenth amendment got anything to do with” Enright’s sentiments, the chief responded, “I prefer not to touch on that. It has not done anything to reduce it.” 1924 Congressional Hearing, 22. New York Representative LaGuardia more pointedly answered that he believed “a jealous regard for State rights enters into it.” *Id.* at 31.

animosity toward the Justice Department or the Bureau.<sup>290</sup> Still, House members did seriously consider under what authority the federal government could “compel the chiefs of police commissioners to furnish this information to [a federal] official.”<sup>291</sup> It seemed necessary, according to one representative, to connect the “constitutional grant of power” to “the purpose of obtaining information” for an existing federal department fulfilling its duties under federal laws.<sup>292</sup>

This was where the passage of time and intervening events made a difference. In 1901, when the IACP first proposed the bill, the Mann Act was still nearly a decade away.<sup>293</sup> By 1924, when Congress reconsidered the bill, the federal government had not only the Mann Act, but also the Volstead Act and the Dyer Act. Chief Burns testified that in the year since the IACP handed over its information bureau to the DOJ, it was already proving to be effective in solving federal crimes, such as “stealing automobiles, the Mann Act, [and] impersonations.”<sup>294</sup> Convinced, Congress established the National Identification Division in July 1924 and, significantly, housed it in the Bureau of Investigation.<sup>295</sup>

Although the federal government’s own needs helped convince a wary Congress, the needs of local governments might well have been more critical to sustained congressional support. Indeed at the heart of the Bureau’s appropriations strategy during this period (and long after) was an appreciation of the sway state and local enforcers had with Congress. Congressional support for purely federal law enforcement projects would come and go. But legislators’ support for the police departments primarily responsible for protecting their constituents would be a permanent feature of the political landscape.

Even after the division’s establishment, the IACP continued to remind its members to “enlighten Senators and Representatives in Congress from their respective districts regarding the success and value of the Division of Information and Identification, that they may readily comprehend its worth and assist in its upbuilding.”<sup>296</sup> Hoover himself encouraged the locals to take pride and ownership over the criminal registry system. As he told IACP members at its 1925

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<sup>290</sup> After Enright’s testimony, the IACP president submitted a letter to the Judiciary Committee that a “statement by anyone that there is not much feeling of friendship between police bureaus and the Department of Justice is made either in ignorance of true conditions or deliberate malice.” 1924 Congressional Hearing, 25; see also text accompanying note 235.

<sup>291</sup> Wickersham Report on Criminal Statistics, 6 (Rep. Dyer).

<sup>292</sup> *Id.*

<sup>293</sup> In 1900, when the IACP president approached the attorney general for his support for a national criminal identification bureau, the DOJ head responded that he did not believe that such a project was “so closely connected with this department as to call for my official support or particular recommendation.” Attorney General Griggs quote in Sankar diss., 258 (citing Misc. Letter Book, No. 45, Letter from AG Griggs to Richard Sylvester).

<sup>294</sup> *Id.* at 78.

<sup>295</sup> 1926 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1926-1930*, vol. 5 (New York, 1971), 50. The division was created “under the provisions of an Appropriation Act which had been passed by the Congress of the United States covering the general expenses of the Bureau of Investigation of the Department of Justice.” *Id.*

<sup>296</sup> *Id.* at 65.

convention, the “Division of Identification is your child.”<sup>297</sup> The following year, he expressed the same sentiment differently: “Of you, by you and for you.”<sup>298</sup> This perfectly encapsulates the origins and function of the division. It was established largely because of the efforts of progressive police chiefs (*by you*); it depended on information that local law enforcement shared with the Bureau (*of you*); and it maintained an information clearinghouse that aided the locals (*for you*), not to mention the Bureau as well. FBI critic Max Lowenthal would later claim that the Bureau had taken over the IACP and Leavenworth fingerprint registries to “eliminate competition,”<sup>299</sup> but the Bureau’s “customers” were fully complicit.

The mutuality of benefits was precisely why the Identification Division proved so successful. Just two years after Congress authorized it, Hoover announced that he could “now say that we have achieved a **practically unanimity** of support for the National Division of Identification of all the Chiefs of Police of all the cities in the United States and Canada of large size.”<sup>300</sup> He was particularly pleased to report that even New York and Chicago—the two cities that had the most fractious relationship with federal authorities because of National Prohibition—had come around and “developed a close relationship of mutual interest and cooperation” with the Bureau.<sup>301</sup> Moving forward, the goal was now “to secur[e] every possible extension of the scope, influence and value of the National Division of Identification” by entering “into continued relations with the sheriffs of every county, in each state of the country.”<sup>302</sup>

Management of the Identification Division extended “the scope, influence and value” of the Bureau as well. Police departments grateful for its services returned the favor by gathering information for the Bureau when needed. As one pundit put it, “When the local officials are puzzled the national bureau clears up the doubt. When Uncle Sam is puzzled, he can call on any of the local officials for information.”<sup>303</sup> Several scholars have noted how this collaboration placed Hoover “at the head of a law enforcement community drawn into a cooperative network.”<sup>304</sup>

The Bureau also expanded the range of data it collected. When IACP leaders testified before Congress in 1924, they suggested that the Identification Division could also compile a host of other facts that could aid law enforcement. This included “daily lists of stolen automobiles, names, numbers, and data that might lead to recovery,” and more generally, “reports of crimes,” “reports of threatened or contemplated depredations by enemies of State,” and “names and descriptions of outlaw organizations and of persons belonging to bomb

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<sup>297</sup> Id. at 50.

<sup>298</sup> Id. at 108.

<sup>299</sup> Lowenthal, 370.

<sup>300</sup> Id. at 111.

<sup>301</sup> Id.

<sup>302</sup> Id.

<sup>303</sup> Id. at 58.

<sup>304</sup> Powers, 157.

gangs”—information of particular interest on the heels of the Red Scare.<sup>305</sup> In 1926, the IACP was thrilled to report that Congress had “endorsed the work” of the Identification Division “by extending appropriations for the advancement of the undertaking” as they had envisioned.<sup>306</sup> More significantly, legislators would begin studying the feasibility of receiving “crime statistics and other subjects germane to the division under the law, all to be afforded enforcing offices [check quote] as information for the prevention, suppression and detection of crime.”<sup>307</sup>

In fact, by the 1920s, calls for better and more statistical data on all things crime related were heard from a diverse array of constituents, from law enforcement to census wonks, from lawyers to social scientists.<sup>308</sup> They were also in agreement that the present situation of data collection and analysis was woefully inadequate. The National Crime Commission deemed that “the United States had the worst criminal statistics of any civilized country.”<sup>309</sup> A handful of states and private associations as well as the federal government had been keeping some form of criminal records since the nineteenth century; New York was the first to start in 1829.<sup>310</sup> But what everyone wanted was a comprehensive, cohesive, and systematic picture of crimes committed, who was committing them, and what was happening to them from arrest to imprisonment. Columbia law professor Raymond Moley identified four different categories of information: crime complaints,<sup>311</sup> identification and characteristics of arrested persons, judicial statistics, and penal statistics.<sup>311</sup>

Progressive reformers had for decades championed surveys as a tool for criminal justice reform. Unsurprisingly, the National Commission on Law Observance and Enforcement, formed in 1929 and headed by former attorney general George Wickersham, touted the importance of data, noting “[s]tatistics are needed to tell us, or at least to help us tell us, what we have to do now, how we are doing it, and how far what we are doing responds to what we have to do.”<sup>312</sup> The commissioners deplored that “no such data can be had for the country as a whole.”<sup>313</sup>

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<sup>305</sup> 1924 Congressional Hearing, 69.

<sup>306</sup> 1926 Proceeding, in *Proceedings of the Annual Conventions of the International Association of Chiefs of Police, 1926-1930*, vol. 5 (New York, 1971), 64.

<sup>307</sup> *Id.*

<sup>308</sup> See Louis N. Robinson, *History of Criminal Statistics*, 24 *Am. Inst. Crim. L. & Criminology* 125 (1933); Beverly Gage, *Counting Crime: J. Edgar Hoover, the Wickersham Commission, and the Problem of Criminal Statistics*, 96 *Marq. L. Rev.* 1109, 1113 (2013); Lawrence Rosen, *The Creation of the Uniform Crime Report: The Role of Social Science*, 19 *Soc. Sci. Hist.* 215, 221 (1995).

<sup>309</sup> National Crime Commission (1927), quoted in Rosen, *Creation*, 220.

<sup>310</sup> Robinson, *History*, 125.

<sup>311</sup> Raymond Moley, *The Collection of Criminal Statistics in the United States*, 26 *Mich. L. Rev.* 747, 748 (1928). See also U.S. National Commission on Law Observance and Enforcement, *Report on Criminal Statistics*, in *U.S. Wickersham Commission Reports*, vol. 3 (1931), 4 (“the statistics which ought to be gathered, compiled, and published authoritatively at regular intervals, fall under three main heads—crime and criminals, prosecution, and penal treatment”).

<sup>312</sup> Wickersham Report on Criminal Statistics, 3.

<sup>313</sup> *Id.*



Here again, fragmentation of authority was the problem. Few states compiled criminal statistics, and those that did used heterogeneous methods that rendered comparative studies futile.<sup>314</sup>

Moreover, any national effort to promote the collection and sharing of comparable statistics would have to depend on states' willingness to participate. While Article 1 of the Constitution authorized the federal government to gather statistics on *persons*, the Wickersham Commission recognized that that authority was "hardly broad enough to cover all that is needed for a complete system of nation-wide criminal statistics."<sup>315</sup> The national government's authority to gather data was thought to cover only that related to an existing federal activity. As a result, by 1930, three different federal departments managed the compilation of three different types of criminal statistics: the Census Bureau had prison statistics, the Children's Bureau had statistics on juvenile courts and delinquency, and the Identification Division had police statistics.<sup>316</sup> To ensure uniformity and ease in use, the commission concluded that the "[c]ompilation and publication of criminal statistics should be centralized ... in one Federal bureau."<sup>317</sup>

The question was, which one? Among the three, the Wickersham Commission insisted that the responsibility ought not to go to the Bureau. Its reasons lay in its effort to separate politics from policy, a common concern of progressive reformers. According to the *Report on Criminal Statistics*, the compilation and publication of statistics were best handled by "some detached bureau unaffected by the desires of the bureau or agency whose activities are to be pictures"—in other words, not "any bureau or agency which is engaged in administering the criminal law."<sup>318</sup> Otherwise, the conflicted agency might tinker with the process or data "to make for itself the most favorable showing possible."<sup>319</sup> The Wickersham commissioners were worried that the Bureau would marshal criminal statistics to justify its expanding authority. "It takes but little experience," the report maintained, "to convince that a serious abuse exists in compiling them [criminal statistics] as a basis for requesting appropriations or for justifying the existence of or urging expanded powers and equipment for the agency in question rather than for the purposes which criminal statistics are designed to further."<sup>320</sup>

By the time the Wickersham Commission issued its report in 1931, however Congress had already selected the Bureau.<sup>321</sup> The Bureau got this capacity-expanding assignment because the project depended on voluntary participation, and collaborative pathways with local police had already been laid. In 1928, the IACP suggested that "the Identification Division of the Department of Justice might be a very logical place in which to assemble statistics on crime, because all fingerprints taken in connection with felonies in the United States are sent to" the

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<sup>314</sup> Rosen, *Creation*, 232 ("The major difficulty in implementing a national crime data system in the 1920s was the lack of a central organization with sufficient legal authority to mold a uniform system from the mélange of disparate and relatively autonomous local governmental units.").

<sup>315</sup> *Report on Criminal Statistics*, 7.

<sup>316</sup> *Id.* at 9.

<sup>317</sup> *Report on Criminal Statistics*, 5.

<sup>318</sup> *Id.* at 5-6.

<sup>319</sup> *Id.* at 5.

<sup>320</sup> *Id.* at 5-6. See also Gage, *Counting Crime*, 1117.

<sup>321</sup> Act of Congress, June 11, 1930; see also *Uniform Crime Reports* 1, no. 1 (August 1930), p.1.

Bureau.<sup>322</sup> In fact, the IACP had already formed the Committee on Uniform Crime Records while waiting for congressional action.<sup>323</sup> Just two months after Congress put the Bureau in charge, the IACP gladly transferred its work to the Bureau.<sup>324</sup>

What had begun as the compilation of prisoners' fingerprints now encompassed much more, as reflected in the division's new name, the National Division of Identification *and Information*. The broadened scope is also evident in "A Guide for Preparing Annual Police Reports," published by the IACP's Committee on Uniform Crime Records in 1929. It divided criminal statistics into two categories, the first "which are considered essential for any police report" and the second "of a less essential nature but which may be presented when available."<sup>325</sup> The first category included facts such as the numbers of police personnel and salaries, crimes committed, crimes reported, and properties lost, stolen and recovered. Auto thefts and recoveries merited its own table.<sup>326</sup> Significantly, also included among "essential facts" were the "sex, age, color, and nativity" of persons charged with crimes.<sup>327</sup>

The second category of "additional facts" contained more specific information, such as comparative crime rates (the Guide helpfully included formulas to calculate rates and percentages), dispositions of arrests and trials, and traffic violations. The IACP -- which had become an enforcer of the Bureau's informational primacy -- also wanted to know the numbers of fingerprints and photographs that departments sent to the DOJ to determine "the extent to which the police are participating in nation-wide identification efforts."<sup>328</sup>

As Professor Pamela Sankar explains, "Stopping something before it happens requires a certain kind of knowledge about the class of events to be stopped—from crop blights, to traffic accidents, to crimes. The knowledge must be intimate and grounded, yet generalizable enough to sustain accurate predictions."<sup>329</sup> Compiling information on criminal elements—from names to personal backgrounds to criminal records—and centralizing that information in one place would allow officials to construct profiles of "dangerous individuals" who warranted surveillance and to ascertain patterns and trends in criminal behavior.

As with Dyer Act cases and fingerprint collection, the Bureau's collaborative collection of criminal statistics served the interests of feds and locals alike. Hoover called the Identification and Information Division a "Library of Cooperation" with the Bureau "only its custodian."<sup>330</sup> In

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<sup>322</sup> Appropriations Bill for 1928, Sixty-Ninth Congress, Second Session, December 1926-January 1927, p. 58 (testimony of Hoover).

<sup>323</sup> *Uniform Crime Reports* 1, no. 1 (August 1930), p.1.

<sup>324</sup> *Id.*

<sup>325</sup> *A Guide for Preparing Annual Police Reports*, by Committee on Uniform Crime Records, IACP (New York, rev. 1929), 7 [hereinafter "Guide"].

<sup>326</sup> *Id.* at 21.

<sup>327</sup> *Id.* at 18.

<sup>328</sup> *Id.* at 34.

<sup>329</sup> Sankar diss., 134.

<sup>330</sup> 1934 Conf. Procs. at 14-15, 29.

contrast to fingerprints, for which the Bureau had to do some quality control and education,<sup>331</sup> police departments remained the sole authors of their own numbers, with the Bureau simply publishing, not second-guessing.<sup>332</sup> The Wickersham Commission would worry about the Bureau's release of graphic charts of "monthly crime trends," accompanied by press statements "quoting and interpreting them without qualification"—notwithstanding the many "weaknesses" in the Bureau's numbers.<sup>333</sup> And with collection and publication responsibilities came the opportunity for the Bureau to shape public perceptions and crime policy, an opportunity Hoover regularly seized in appropriations hearings.<sup>334</sup> Although the commission hoped that the Bureau's role would be temporary, locals' support for the Bureau ensured that its hope for "the ultimate plan" that didn't involve the Bureau would never materialize.<sup>335</sup> This service continues today as the Uniform Crime Reporting system.<sup>336</sup>

The Identification and Information Division and Dyer Act prosecutions were not the only pieces of informational infrastructure that the Bureau provided. Other important pieces included the FBI Laboratory, which started in 1932 and provided forensic assistance to departments throughout the country.<sup>337</sup> Here again, service and control ran together. Although Hoover initially welcomed the creation of state and local labs and allowed Bureau experts to offer corroborating testimony in important cases, that practice ended in 1941: Bureau experts would no longer testify on matters in which others had testified.<sup>338</sup> Indeed the Bureau's anticompetitive tactics allegedly went further. According to former assistant director William Sullivan, the Bureau

maintained a blacklist of police departments euphemistically called the 'Restricted List.' A law enforcement agency placed on the Restricted

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<sup>331</sup> See, e.g., FBI, *The Science of Fingerprints: Classification and Uses 1* (1985) (publication educating departments on fingerprinting notes need for fingerprint cards to be "clear and distinct").

<sup>332</sup> Michael D. Maltz, *Crime Statistics: A Historical Perspective*, 23 *Crime & Delinquency* 32, 39 (1977) ("Only when the submission of a police department is greatly at variance with the expected crime rates does the FBI refuse to publish the jurisdiction's data").

<sup>333</sup> Report on Criminal Statistics, 10; see also Lowenthal, 395.

<sup>334</sup> Appropriations Bill for 1932, Seventy-First Congress, Third Session, December 1930 (Hoover). Hoover also used the Uniform Crime Reports to justify the staff increase to form the Research Unit of the Crime Records Division, which functioned as a public relations office for the Bureau. See Powers, 157-158.

<sup>335</sup> Report on Criminal Statistics, 17.

<sup>336</sup> See <https://www.fbi.gov/services/cjis>

<sup>337</sup> Hoover would later boast:

all a law enforcement agency need do is invest in the price of a postage stamp, and it has available the entire resources, talents and experience of the FBI Laboratory. A small sheriff's office or police department -not financially able to maintain a criminal laboratory-has at its disposal the latest developments of science. Surely, this is a wondrous accomplishment-an accomplishment which occurs not occasionally, but many times every day.

John Edgar Hoover, *Cooperation: The Key to Effective Law Enforcement in America*, 12 *Syr. L. Rev.* 1, 8 (1960).

<sup>338</sup> Duayne Joseph Dillon, *A History of Criminalistics in the United States, 1850-1950*, D.Crim. dissertation, U. Cal Berkeley, 1977 at 179-80.

List may find itself completely cut off from the services of the FBI Lab. The quickest and surest way for a local department to be placed on the Restricted list was to criticize the efficiency of the FBI or to encourage the establishment of independent regional labs. The list still existed in 1976.<sup>339</sup>

Just as the Bureau had once eliminated competing fingerprint registries by acquiring the IACP's and Leavenworth's databases, so too would it further cement its position within the criminal enforcement ecosystem by turning its labs into an "essential facility"<sup>340</sup> that it used even more strategically.

In 1935, the Bureau also added the National Academy to train police officers and, in the process, create a cadre of willing collaborators in Bureau operations and the nationwide informational network. During his 1937 appropriations testimony, Hoover noted that the Academy "remove[d] the argument for the establishment of a national police force" because it "bridge[d] over that gap between local and Federal law-enforcement officers" by "eliminat[ing] the jealousies that sometimes exist and help[ing] to do away with friction with may develop."<sup>341</sup> By 1940, he would proclaim the Academy the "West Point of Law Enforcement" and its graduates a "'reserve force' that could 'be mustered into the service of the FBI.'"<sup>342</sup>

Hoover made sure that the American public, and not just the local police, understood the Bureau's role. He allowed Universal Pictures to shoot a short documentary about the FBI, titled *You Can't Get Away With It*, showcasing the agency's work.<sup>343</sup> Released in 1936, the film explained how violations of the Dyer Act "put the G-men" on the trail of notorious criminals. It recorded the Identification Division's cache of fingerprints and system of matching them to suspects, as well as the Crime Lab where experts analyzed fingerprints, handwriting, and bullet patterns; created mouldage impressions to compare teeth marks, footprints, and other body parts; and used newfangled scientific tools so that "there was no crime that cannot be solved." The documentary even showed agents practicing their marksmanship at the Academy. *You Can't Get Away With It* closed with Hoover looking straight into the camera, declaring that the FBI "belongs to you." The piece beautifully captures both strands of the Bureau's strategy: An avowal of service, deeply rooted in its relationships with state and local authorities, and an implicit (barely) declaration of professional superiority and centrality to crime-fighting throughout the nation.

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<sup>339</sup> William C. Sullivan, *The Bureau: My Thirty Years in Hoover's FBI* 98 (1970).

<sup>340</sup> Thomas F. Cotter, *The Essential Facilities Doctrine*. *Antitrust Law and Economics*, (Keith N. Hylton, et al. eds., 2008).

<sup>341</sup> Appropriations Bill for 1937, Seventy-Fifth Congress, First Session, January 1937, at 81-82.

<sup>342</sup> Maria Ponomarenko, at 177 (quoting J. Edgar Hoover, "M-Day for the FBI," *The Atlanta Constitution*, August 11, 1940, p. B4).

<sup>343</sup> Available at <https://www.youtube.com/watch?v=ni2SP6GAA1o&feature=youtu.be>.

### C. Into the Postwar Period

In the 1940s, war responsibilities took center stage at the Bureau, which leveraged its relationships with local departments and private organizations into the national security arena.<sup>344</sup> As Maria Ponomarenko notes, local or state police handled as many as 30 percent of all “national defense” cases between October 1940 and October 1942.<sup>345</sup> (Such a high degree of leverage in national security policing continues to this day.<sup>346</sup>) This added reliance on locals during wartime explains why the Bureau did not pause its work on Dyer Act cases; more than ever, it needed to keep cultivating the relationship of mutual benefit. And, in fact, Hoover continued to feature Dyer Act recovery figures as justification for the Bureau’s appropriations.<sup>347</sup> In a 1942 appropriations hearing, he noted a “slight decline” in convictions—from 2,340 in 1941 to 2,282 in 1942.<sup>348</sup> Another drop, the following year, was attributed to the “fact that there are not so many automobiles for sale, but principally and probably because of gasoline rationing and the difficulty of getting tires.”<sup>349</sup> As the war ended, Hoover noted that auto thefts were starting to spike.<sup>350</sup>

Postwar and into the 1960s, the Bureau ramped up its internal security operations and belatedly began to focus on organized crime and civil rights violations.<sup>351</sup> Even amid these forays, however, Dyer Act cases (along with bank robberies and fugitive apprehensions) continued to provide a ground bass—a steady source of statistics justifying appropriations for legislators skeptical of the Bureau’s other work.<sup>352</sup> In 1946, when Hoover asked for an additional

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<sup>344</sup> 1947 Approps Hrgs (1946). See Theoharis & Cox, *The Boss* at 193 (recounting establishment of “contact programs” with the American Legion, and collaborative relations with other associations).

<sup>345</sup> MP at 180.

<sup>346</sup> See Richman, *The Right Fight*; Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 *Stan. L. Rev.* 289 (2012).

<sup>347</sup> In 1941, when Sen Norris criticizes the Bureau for arresting members of the Abraham Lincoln Brigade, one Representative responded that “when the FBI returns almost \$8 for every dollar it spends, through collection of fines and the restoration of property, we, as Members of Congress, should think carefully before we hastily criticize such a great law-enforcement agency of the Federal Government.”) *Congressional Record* v. 86, 76th. Cong., 3rd. Sess.: 3 January 1940-3 January 1941, at 2443. (Stockham at 159).

<sup>348</sup> Hearing for Appropriations Bill for 1943, Seventy-Seventh Congress, Second Session, January 1942 at 118-119 (also noting that were Congress to enact a proposal to make “the theft of automobile tires a Federal offense” the Bureau would need “additional funds”).

<sup>349</sup> Hearings for Appropriations Bill for 1945, Seventy-Eighth Congress, First Session, December 1943 [295] (testimony of Director of the Bureau of Prison).

<sup>350</sup> Hearings for Appropriations Bill for 1947, Seventy-Ninth Congress, Second Session, January 1946 at 155 (noting uptick in auto thefts after war. Crime wave; 27% more automobile thefts between November 1944 and November 1945. 74% increase in auto theft violations from October 1940 to January 1946. 62% of car thefts committed by persons under age 21.).

<sup>351</sup> See, e.g. *Annual Report of the Attorney General, 1965-66*, at 345-63.

<sup>352</sup> See Hearings on Appropriations Bill for 1955, Eighty-Third Congress, Second Session, December 1953 [167-168] (testifying at a 1953 appropriations hearing, Hoover noted, “[d]uring the past year 13,886 stolen automobiles were recovered in cases investigated by the Bureau, an all-time high,” and called auto theft “one of the most aggravated criminal problems we are faced with in this country”).

3,000 agents, he noted that each agent was currently handling an average of 19.09 cases and reported that Dyer Act cases (among others) were bound to increase. This same year, Hoover expressed his concern to Attorney General Tom Clark—who had recently ordered the Bureau to investigate the lynching of four African Americans in Monroe, Georgia, by a mob of twenty—that a massive effort of enough agents “to operate a middle-sized field office” had not found the official involvement that would support a federal prosecution and had come at the expense of a rising number of “delinquent cases.”<sup>353</sup>

In the late 1960s, the Bureau began to pull back.<sup>354</sup> The turning point, however, came in 1970, when the Justice Department issued guidelines that limited Dyer Act prosecutions to “organized crime ring cases and multitheft operations unless exceptional circumstances are involved. Under the guidelines, individual theft cases are ordinarily not to be federally prosecuted.”<sup>355</sup> Suddenly, even as the number of reported motor vehicle cases climbed, Dyer Act filings dropped from 4,090 cases (10.7% of all filed) in 1970 to 2,408 cases (5.8% of all cases filed) in 1971.<sup>356</sup>

But the Bureau did not give up this line of business easily. In 1969, Tom Wicker observed that even if it was local police, not FBI agents, that chased down stolen cars that crossed state lines, the Bureau still “[took] the recovered automobiles, add[ed] their value to its statistics, prosecute[d] the thief if possible, and count[ed] him as another arrest and conviction.”<sup>357</sup> James Q. Wilson later noted the same pattern: agents “would call up local police departments in search of recovered cars, which, if it could be shown they had come from out of state were listed as ‘FBI recoveries.’”<sup>358</sup>

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<sup>353</sup> Elliff, at 231-32.

<sup>354</sup> Perhaps the Bureau was showing some selectivity in the early 1960s. See *Car Thief Is Riding High*, Hartford Courant, Jan 13, 1963, at 4G (noting that the FBI was “mainly concerned with criminals using stolen cars in their crimes, and also with the big professional theft rings. Local and state police handle intra-state car theft.”). But see Report of the Attorney General for 1965-66, at 356 (explaining number of stolen car investigations in part by noting “widespread use of these vehicles in the commission of other crimes”).

<sup>355</sup> Gov’t Acct. Office, U.S. Attorneys Do Not Prosecute many Suspected Violators of Federal Laws. GGD-77-86, at 15; see Wilson at 30 (noting DOJ directive ““not to prosecute interstate auto-theft cases where the guilty person was under the age of twenty-one and not a serious recidivist or over the age of twenty-one and not previously convicted of a felony, unless the car was one of several cars stolen by a ‘car ring,’ was stripped or demolished, or was used to commit a separate felony”); see also U.S. Plans to Curtail Federal Charges of Automobile Theft, N.Y. Times, May 27, 1970, at 20 (noting that one of every eight cases files in Fed cts involves Dyer Act and 20 percent of all of Fed prison inmates sentenced under Dyer Act).

<sup>356</sup> GAO report, at 15.

<sup>357</sup> Tom Wicker, *What Have They Done Since They Shot Dillinger?*, N.Y. Times, Dec. 28, 1969, at SM4; see also Louis M. Kohlmeier, *Hoover Loses Immunity to Criticism Despite “Law-and-Order” Mood*, Wall St. J., Oct. 10, 1968, at 1 (noting that “[s]ome crime experts question the significance” of Hoover oft-touted statistics about recoveries and fugitives located, since “[l]ocal police often help capture fugitives and recover cars”).

<sup>358</sup> James Q. Wilson, *Investigators* at 98; see also Fred Cook at 209 (noting that the stolen cars for which the Bureau took credit were generally found by local police and that even when investigating car theft rings, the Bureau was assisted not just by local police but by “detectives of private agencies like the National Board of Fire Underwriters, which represents the insurance industry”).

The response of the U.S. Attorney's Offices that prosecuted Dyer Act cases varied. In his extraordinary field study of those offices, James Eisenstein found some U.S. Attorneys scoffing at all but prosecutions of interstate rings. As one prosecutor put it, the Bureau's "interest is statistics," and "that's such a trivial thing."<sup>359</sup> In some districts, judges pressured U.S. Attorneys not to pursue "junk" theft cases. But agents often pressured prosecutors to take even routine cases, and they often succeeded in part because U.S. Attorneys were willing to accommodate a field office.<sup>360</sup>

There was a final moment of clarity (or farce) in 1972, during Hoover's last appearance before a House Appropriations subcommittee (shortly before his death). Referring to recent allegations that the Bureau used Dyer Act statistics to sway appropriators,<sup>361</sup> Chairman John Rooney (a close ally) noted:

We know when a car is recovered that at least six agencies participate in the credit for it, and when it comes to fines and recoveries we know that there are at least five agencies which participate in the credit for that. There is nothing wrong with that. We were never hoodwinked by anything done here, I assure you, because I think all the Members of this Committee are a bit hardboiled.<sup>362</sup>

After Hoover's death, his successor, L. Patrick Gray, "wean[ed] the F.B.I. from its concentration on [Dyer Act cases], an investigative field that some say Mr. Hoover used to fatten arrest statistics."<sup>363</sup> In 1975, the next Bureau director Clarence Kelly (responsible for giving James Q. Wilson access to the Bureau) established a broad "Quality over Quantity" program "designed to downplay statistics for their own sake in favor of more thoughtful priority setting in each field office."<sup>364</sup> According to Wilson, this had an immediate effect on Dyer Act cases. "When an out-of-state stolen automobile is recovered by a local police department," Wilson explained, "the Bureau no longer adds the vehicle to its caseload unless it appears to be the work of a criminal 'ring' or unless there is a known subject who is a repeat offender."<sup>365</sup> And he noted

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<sup>359</sup> Eisenstein, *supra* at 169.

<sup>360</sup> James Eisenstein, *Counsel for the United States: U.S. Attorneys in the Political and Legal Systems* 105 (1978); see Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *Colum. L. Rev.* 749, 769-773 (2003) (exploring how agencies can leverage their investigative authority to influence prosecutorial priorities).

<sup>361</sup> See also William C. Sullivan, *The Bureau: My Thirty Years in Hoover's FBI* 118 (1970) ("What the senators never knew was that most (if not all) of the real work involved in investigating the kinds of crimes that made for Hoover's blockbuster statistics, juvenile car theft and the like, was done by the local police, not the FBI.").

<sup>362</sup> Wilson, at 173, quoting House Appropriations Subcommittee, *Departments of State, Justice et al*, 92nd Cong., 2d sess., 1972, pp. 54-55, 73; see Kohlmeier, *supra* (noting Rooney's "close" ties to Hoover).

<sup>363</sup> Christopher Lydon, *Whoever Runs It, F.B.I. Faces Problem of Political Control*, Mar. 26, 1973, at 30.

<sup>364</sup> Wilson at 131.

<sup>365</sup> Wilson at 132. For an example of a program, fostered by the Bureau and the National Auto Theft Bureau, that promoted state-based auto theft efforts, see James S. McKinnon, *Cooperation--Key to Florida Auto Theft Intelligence Unit's Success*, 47 *FBI Law Enf. Bull.* no. 89 at 12 (August, 1978) (describing program "conceived" at 1972 meeting of the Intl. Assn. of Auto Theft Investigators).

that the program “was welcomed by agents for the relief it offered from carrying trivial cases for statistical reasons, but since these cases had rarely been investigated seriously, no real changes in agent behavior occurred.”<sup>366</sup> The Bureau’s pullback was also a function of pressure exerted by the Executive Office of US Attorneys on federal prosecutors around the country to downgrade “non-ring” cases. The readiness of that office to monitor Dyer Act activity was, Eisenstein reports, the main reason why Dyer Act cases plummeted from 12.7 percent of all criminal terminations in 1970 to 4.3 percent in 1975.<sup>367</sup>

Even as it cut back on Dyer Act cases, bank robbery cases gave the Bureau a similar vehicle for service, albeit to a lesser extent.<sup>368</sup> In the late 1970s, the Carter Administration called for the agency to leave most bank robberies to local authorities in an effort to re-center the Bureau on investigations where it truly had a comparative advantage, like white collar cases.<sup>369</sup> But the Bureau largely resisted. Echoing the Dyer Act story, the role such service cases played in nurturing the Bureau’s relationships with local enforcers and their congressional allies and commercial interests<sup>370</sup> ensured that bank robberies would be an FBI concern until 9/11.

#### IV. Conclusion / Theoretical Implications

The foregoing narrative tells how the new mobility of the automotive age catalyzed the development of the FBI from bureaucratic appendage to federal centerpiece of a policing network. By collecting and disseminating criminal information through the Identification Division and by processing criminal information as Dyer Act (and, after 1934, Fugitive Felon) prosecutions, the Bureau made a place for itself in the “twilight” areas that lay beyond the reach of local departments. In the process, the Bureau transformed the “assemblage” of mostly local

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<sup>366</sup> Wilson at 158.

<sup>367</sup> Eisenstein, at 106.

<sup>368</sup> James Q. Wilson, *The Investigators: Managing FBI and Narcotics Agents* 27 (1978) (“When a bank is robbed, the FBI responds immediately.... The FBI must apprehend the suspects in these cases just as if they were local police officers, but often the charging and prosecution of these cases is turned over to the local police who will also be on the scene.”).

<sup>369</sup> Bank Robbery: The Federal Law Enforcement Role Should Be Reduced. GGD-78-87; B-179296.

<sup>370</sup> Philip Taubman, *F.B.I. Role Dispute in Administration*, N.Y. Times, June 22, 1979, at A28 (noting that while Carter Administration was pushing the Bureau to “turn bank robbery investigations over to local law enforcement agencies,” “with bank robberies occurring at a record rate and the number of convictions for the crime declining, powerful forces in Congress and the banking industry are opposed to the sudden reduction of FBI involvement.”). The banking industry had always been a big booster of the Bureau’s bank robbery work. See Dept. of Justice Appropriation Bill for 1941, Hrgs. Subcom. of Comm. on Appropriations, 66th Cong., 3d Sess. 148 (1940) (Hoover brings letters from the American Bankers Assn. and an Oklahoma bank organization telling “how they have been able to reduce insurance rates by reason of the effectiveness of agents of the F.B.I.”).

The Bureau’s bank robbery work had (understandably) always generated strong support from the banking industry. Dept. of Justice Appropriation Bill for 1941, Hrgs. Subcom. of Comm. on Appropriations, 66th Cong., 3d Sess. 148 (1940) (Hoover brings letters from the American Bankers Assn. and an Oklahoma bank organization telling “how they have been able to reduce insurance rates by reason of the effectiveness of agents of the F.B.I.”).



police departments<sup>371</sup> into a national policing network. Yet the very means by which the Bureau emerged as an indispensable player in that network and as a renowned protagonist in its own right had implications for both the Bureau's autonomy and criminal justice federalism.

### A. Autonomy

The means by which the Bureau achieved its network role would be familiar to tech entrepreneurs today: it established a criminal information platform, not just through its Identification Division and Laboratory, but also through Dyer Act cases. As Lina Kahn has powerfully argued with respect to Amazon, a firm controlling a platform can leverage its privileged access to information to gain a competitive advantage when it also pursues the same sorts of business opportunities as its platform users.<sup>372</sup> Yet unlike the Amazon story, there was little risk that the Bureau would deploy the increasing broad jurisdictional grants entailed by new criminal statutes to massively encroach on local police turf. To be sure, the Bureau would regularly draw on, and further burnish, its national status by making Big Cases on the backs of the locals. Its hand would soon be strengthened by its domestic security role. At the outbreak of World War II, President Roosevelt issued an order—drafted by Hoover after hearing that the New York Police Department intended to create a substantial “special sabotage squad”—authorizing the Bureau “to take charge of investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations.” The order directed local police to “promptly turn over” to the Bureau any information relating to these matters.<sup>373</sup> Yet notwithstanding the new statutes that ostensibly allowed it to do so, the Bureau's size and structure precluded significant displacement of local criminal authority, and the Bureau showed no inclination in pursuing that goal.

How does this story fit within the frequent claims of the Bureau's “autonomy,” particularly under J. Edgar Hoover? Partly because his focus is on the extent to which agencies can escape congressional and presidential control, Daniel Carpenter speaks of “autonomy” as occurring when politicians given an agency “free rein in program building.”<sup>374</sup> James Q. Wilson similarly suggests that bureaucratic autonomy can, in part, be measured by an agency's ability to avoid unwanted functions.<sup>375</sup> Yet even when it came to domestic intelligence collection far removed from its criminal work, the Bureau's autonomy in Hoover's heyday is difficult to discern. Hoover may have used his secret files to gain sway over several presidential

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<sup>371</sup> Patrick Joyce, *The State of Freedom: A Social History of the British State Since 1800* ch 1 at 19 (2013) (describing network as “held together (sometimes very uncertainly) at particular key sites or nodes and through the actions of key actors and processes, human and non-human”).

<sup>372</sup> Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 783 (2017); see also Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 Berkeley Tech. L.J. 1051, 1087 (2017) (on risk that a platform will “leverag[e] its market position unfairly to establish a dominant position in other markets”).

<sup>373</sup> Theoharis & Cox, at 179-80.

<sup>374</sup> Daniel Carpenter: *The Forging of Bureaucratic Autonomy*, at 4.

<sup>375</sup> James Q. Wilson, *Bureaucracy* 108 (1989); see Brian A. Ellison, *A Conceptual Framework for Analyzing Bureaucratic Politics and Autonomy*, 25 Am. Rev. Pub. Admin. 168 (1995).

administrations,<sup>376</sup> but he was also spectacularly responsive to his political masters.<sup>377</sup> And in the criminal area, as we have seen, it is a strange autonomy that would find an agency yoked to a regular grind of service cases that relieve the obligations of others.

Carpenter suggests that “multiple networks” promote autonomy by reducing dependence on any one group, “putting the agency in the role of broker among numerous interests seeking access to the state.”<sup>378</sup> But a Carpenter-like story of autonomy-forging can easily overlook the “agency” of the counterparties to the Bureau’s alliances—the states, localities, and associations that comprised its “multiple and diverse” “network affiliations.”<sup>379</sup> When the Bureau set aside a large proportion of its docket to service cases, was it harnessing the power of policing and commercial interests for its own ends or becoming a tool of them? When it comes to Congress, which surely was also responding to those same interests, the observational equivalence problem is even greater: The Bureau clearly thought Congress wanted regular updates on its car theft work and cooperation with local authorities. Did what started as a weak agency’s commitment to building support through service turn, by the 1960s, into a strong agency’s anachronistic desire to throw a statistical sop to Congress? Did the Dyer Act line of business turn over time into a well-internalized burden? A sign of bureaucratic lethargy?<sup>380</sup> We doubt these questions can be answered, and appreciating how the Bureau’s associational alliances sustained its criminal work well beyond its first half century does not require answering them.

A more nuanced notion of “autonomy” is particularly appropriate when thinking about the Bureau. As a normative matter, vague talk of “autonomy” tells us little about how to balance political accountability—which remains critical for an agency that lives in the shadow of

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<sup>376</sup> Powers; Theoharis & Cox; others.

<sup>377</sup> See, e.g., Keith E. Whittington & Daniel P. Carpenter, Executive Power in American Institutional Development. 1 *Perspective on Politics* 495, 504-05 (2003) (on Hoover’s responsiveness to presidential demands); Christopher John Gerard, “A Program of Cooperation”: The FBI, the Senate Internal Security Subcommittee, and the Communist Issue, 1950-1956, at 393 (Ph.D. dissertation, Marquette University, 1993) (noting how Senate Internal Security Subcommittee spurred Bureau’s security investigations during Truman and Eisenhower administrations and how “[s]uccessive attorneys general approved and sustained the FBI-SISS relationship [] for partisan reasons and in service to the greater cause of anti-communism”); Nathan G. Theoharis & John Stuart Cox, *The Boss: J. Edgar Hoover and the Great American Inquisition* 395-401; 407-18 (1988) (on Hoover’s responsiveness to Presidents Johnson and Nixon, respectively); Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities (Church Committee Report), book II, at 225 (1976) (on “political abuse of intelligence information”).

<sup>378</sup> Carpenter at 363; see also Ellison, *supra* at 173 (“The greater an agency’s willingness to work with other governmental actors, the more likely the agency will maintain its autonomy.”)

<sup>379</sup> Carpenter at 32.

<sup>380</sup> In 1970, a former agent noted:

Patterns develop. Consequently agent man-power continues to be focused on stolen car cases, on “petty” thefts, and on bank robberies (etc), because these types of crime have produced high statistical success in the past. Sameness sets in. Read the Appropriations for 1971, and it will seem like a carbon copy of Appropriations for 1970.

Letter of Jack Shaw to Prof. Abram F. Blumberg, Sept. 15, 1970, in Cong Rec. Feb. 1, 1971, at S1197, 1199 (reprinted at behest of Sen. George McGovern, after Hoover retaliated against letter writer).

Hoover—with insulation from partisan or personal agendas. And as a positive matter, the Bureau’s history and its operational realities demand that sweeping discussions of “independence” fully take these associational alliances into account.

Yet Carpenter is surely right that strength can flow from dependence. With the agenda constraints and resource obligations of the Bureau’s service work came the support of those it served. Maximal interaction with state and local enforcers—not simply drawing on their informational networks for assistance in national security, organized crime, and other “big” cases, but evening the balance with collaboration on more local projects—has long been a key to the Bureau’s status within the national ecosystem and within the federal government.<sup>381</sup>

One therefore might worry about the durability of the alliances explored here. In the wake of 9/11, the Bureau, lacking the resources to surge its counterterrorism programs without retreating elsewhere, significantly “reduced its investigative effort in traditional crime matters,” leaving state and local agencies to handle most bank robberies, even though they exceeded the investigative capabilities of “a few.”<sup>382</sup> Some argued that its new priorities meant the Bureau was “no longer the appropriate institutional home for the UCR.”<sup>383</sup> Moreover, while direct federal grants to states that Hoover opposed back in 1934 have become a staple of state budgets (even as the level of government they go to, state vs. local, has long been a matter of political contestation),<sup>384</sup> they scarcely strengthen the Bureau’s hand, as control lies elsewhere. The Bureau’s retreat in recent years from the “service work” of Dyer Act cases and bank robberies may come at the cost of police support, and the support of legislators protective of police interests. Sure, the locals continue to get substantial assistance from the Bureau in the form of cases taken on for special federal investment—perhaps targeting local corruption, perhaps violent gangs—and support from the Identification Division and the FBI Laboratories. But the perceived balance of payments perhaps isn’t what it was in the old days.

Broad strategic initiatives in recent years<sup>385</sup> -- designed to take full advantage of the Bureau’s unique capabilities -- may lead to an unintended weakening in the political support that has long sustained the agency. This is not necessarily an argument for returning to Dyer Act cases or their contemporary equivalents—violent crime, small-scale cybercrime—but for an awareness of the costs of jettisoning them. Outside of protecting the country against international terrorist attacks (and particularly with the domestic terror threat looming increasingly large), the

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<sup>381</sup> This interaction also contributes to federal enforcers’ networked accountability, see Richman, *Federal Sentencing* in 2007, 117 *Yale L. J.* at 1407-11; Richman, *Accounting for Prosecutors*.

<sup>382</sup> U.S. Dep’t of Justice, Office of the Inspector General, *The External Effects of the Federal Bureau of Investigation’s Reprioritization Efforts*, Audit Rep. 5-37, at 30, 32 (2005).

<sup>383</sup> Richard Rosenfeld, *Transfer the Uniform Crime Reporting Program from the FBI to the Bureau of Justice Statistics*, 6 *Crim. & Pub. Pol’y* 825, 830 (2007). Under Director Comey, in 2015, the Bureau pushed forward on a new statistical platform, the National Incident-Based Reporting System. See Jeffrey Fisher, *The Police Chief*, Oct. 2017: FBI, SRS to NIBRS: The Path to Better UCR Data (2017), <https://www.fbi.gov/services/cjis/cjis-link/srs-to-nibrs-the-path-to-better-ucr-data>

<sup>384</sup> Richman, *Violent Crime Federalism*.

<sup>385</sup> Ranjay Gulati, Jan Rivkin & Ryan Raffaelli, *Does “What We Do” Make Us “Who We Are”?* Organizational Design and Identity Change at the Federal Bureau of Investigation, Harv. Bus. Sch. Working Paper 16-084 (2016).

Bureau's responsibilities remain in flux and thought should be given to the relationship between what it does and what it is—from where it gets the support it needs. Perhaps some day private information platforms and aggregators will replace local police as the Bureau's principal source of operational sustenance and potential support (or resistance).<sup>386</sup> But enough speculating.

Our analysis also suggests a more general relationship between structure and function in the context of any regulatory or enforcement project that requires the acquisition of information and the processing of it—or when thinking about the State, writ large.<sup>387</sup> The arrow between institutional architecture and informational acquisition runs both ways, with the resulting flow of information shaping the regulatory processing and output. As we have seen, in the federal criminal enforcement context, the extent to which an agency outsources information gathering<sup>388</sup> gives external entities the power to shape agency docket. This story of non-federal entities shaping federal priorities because federal agencies rely on them for information can't possibly be unique to the criminal enforcement space. And though we leave the work for others, we presume that this framework would shed far more light on “operational federalism”—how our system of “compound government” actually works—than static stories of formal relationships between federal and non-federal entities that fill the literature.

## B. Horizontal Federalism

Our story of how the Bureau grew and managed its policing network also helps explain the criminal justice localism that continues to this day. States provide penal law and prisons, but counties and municipalities decide who gets prosecuted for what, how defendants are treated, and how police and prosecutors interact with the communities they serve. Notwithstanding progressive impulses toward centralization and the challenges of the new (auto)mobility, police and national leaders responded to the problem of interstate coordination not with conditional grants in aid to the states or with material support to build a horizontal infrastructure of state-to-state collaborations, but with federal criminal laws and a federal infrastructure. These particular solutions to the interstate coordination problem relied on—and strengthened—the authority of local police departments, for they were able directly to negotiate their relationships with the feds from a position of informational strength.

Our story also suggests that whether or not a formal “anti-commandeering” principle mediates the relationship between the federal government and state and local police departments, and whether or not the Rehnquist Court created that doctrine in *New York v. United States* and *Prinz v. United States* out of whole cloth,<sup>389</sup> are really beside the point. The organization of criminal enforcement authority and resources in the United States has always guaranteed the

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<sup>386</sup> See Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 *Stan. L. Rev.* 99 (2018).

<sup>387</sup> See Patrick Joyce, *The State of Freedom*, *supra* at 146 (exploring “importance of information communication” when “approaching how the heterogeneous institutions of the state are held together”).

<sup>388</sup> One could frame this in economic terms as “buys” rather than “makes.” Ronald Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937).

<sup>389</sup> See Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, *Annals*, 574 *Amer. Acad. Pol. Soc. Sci.* 158 (2001); Erik M. Jensen & Jonathan L. Entin, *Commandeering, The Tenth Amendment and the Federal Requisition Power*, 15 *Consti. Comment.* 353 (1998).

principle. Cops don't work for free, and neither do their departments. To be sure, local departments will occasionally balk at discrete and controversial policies like gun control<sup>390</sup> and immigration.<sup>391</sup> But when it comes to the "normal," broader law enforcement portfolio, the feds always had to be sensitive to local "autonomy" to ensure mutual benefits. In this broader context, recruitment has always been open to negotiation, and information gathered for exchange.

Certainly, more recent developments have changed the balance of power in the criminal justice space. Elizabeth Hinton's recent book,<sup>392</sup> for instance, highlights the extent of federal grant activity (even though her focus on federal sources leads her to give short shrift to the agency of cities and states in setting their own criminal justice policies).<sup>393</sup> The federal informational infrastructure continues to loom large in criminal enforcement efforts, but statewide and local databases are becoming increasingly important, especially as states are engaging in information sharing. Particularly noteworthy is the growth of state and local DNA databases that are not governed by the strict restrictions of the CODIS system controlled by the FBI.<sup>394</sup> Moreover, a road not taken in the 1930s—federal support for state-based criminal databases—was to some extent taken in the wake of 9/11 in form of intelligence fusion centers established around the country.<sup>395</sup>

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<sup>390</sup> See Simon Romero & Timothy Williams, When Sheriffs Say No: Disputes Erupt Over Enforcing New Gun Laws, *N.Y. Times*, Mar. 11, 2019 (on local enforcer resistance to state gun control laws).

<sup>391</sup> See Trevor George Gardner, Immigration Sanctuary as the "Old Normal": A Brief History of Police Federalism, 119 *Colum. L. Rev.* 1, 77-80 (2019) (on current local resistance to federal immigration enforcement); Richman, Right Fight, *Boston Review* (on post 9/11 push back to federal immigration efforts by local police); Matthew C. Waxman, Police and National Security: American Local Law Enforcement and Counterterrorism after 9/11, 3 *J. Nat'l Sec. L. & Pol'y* 377, 394-95 (2009) (similar); see also Jessica Bulman-Pozen & Heather K. Gerkin, Uncooperative Federalism, 118 *Yale L.J.* 1256 (2009).

<sup>392</sup> Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (2016).

<sup>393</sup> Campbell notes, however:

Federal efforts in the 1960s and 1970s to press criminal justice reform, coordinate and centralize local and state activities, and professionalize state criminal justice systems through the Law Enforcement Assistance Administration still left considerable latitude to state and local governments, and no wholesale rethinking of how to organize and coordinate state and local criminal justice systems occurred in most states. This left local jurisdictions with ample leeway in determining how to enforce the law.

Michael C. Campbell, Varieties of Mass Incarceration: What We Learn from State Histories, 1 *Annu. Rev. Criminol.* 219, 227 (2018); see Malcolm M. Feeley & Austin D. Sarat, *The Policy Dilemma: Federal Crime Policy and the Law Enforcement Assistance Administration* (1980).

<sup>394</sup> Jason Kreag, Going Local: The Fragmentation of Genetic Surveillance, 95 *B.U. L. Rev.* 1491 (2015). Worth noting, however, is the FBI's continued reluctance when deploying its facial recognition system "to set accuracy standards" for the systems used by other contributing agencies, state and federal. Gov't Acct. Office, Statement of Gretta L. Goodwin, Face Recognition Technology: DOJ and FBI Have Taken Some Actions in Response to GAO Recommendations to Ensure Privacy and Accuracy, But Additional Work Remains, 18 (June 4, 2019).

<sup>395</sup> See Daniel Richman, *The Right Fight*; see also Danielle Keats Citron & Frank A. Pasquale, Network Accountability for the Domestic Intelligence Apparatus, 62 *Hastings L.J.* 1441 (2011); Torin Monahan, *The Murky*

Even so, governors and other statewide actors still generally lack the authority over policing and prosecutors that they lacked in the 1930s—a fact that police-involved shootings and police abuses regularly bring into sharp focus.<sup>396</sup> Recent work has highlighted how we need to look to “local contexts” and “the diffusion of punitive approaches from local terrains to states and regions” to understand “changes in penal practice and imprisonment.”<sup>397</sup> Although the “Gubernatorial Administration” that Miriam Siefter notices across many policy spaces has also reached into wholesale penal issues like prison construction and decriminalization,<sup>398</sup> it rarely extends directly to criminal enforcement operations.<sup>399</sup> As we have noted, the criminal justice project’s focus on violence and property crime (as is generally true in the United States) and the informational needs inherent in such a focus will inevitably push authority down to the county (even precinct) level. This reality has long been reinforced by the celebration of the local as the situs of criminal justice, where the main actors—police, prosecutors, courts, juries, and citizens of the vicinage—are found.

Moreover, federal crime creation remains the default solution to interstate enforcement coordination inadequacies.<sup>400</sup> One need only look at recent efforts to address the interstate problem of “deadbeat dads”—parents in child support arrears but residing outside the jurisdiction of state recovery efforts. The statutory solution was the 1992 Child Support Recovery Act, which created a new federal crime. In 1998, when the misdemeanor status of the offense was deemed insufficient to punish the deadbeat and incentivize enforcers, Congress bumped it up to a felony.<sup>401</sup> Unlike auto thefts, these cases didn’t fill the federal docket, but the nature of the response has

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World of Fusion Centers, 75 Criminal Justice Matters 20 (2009); Torin Monahan & Neal A. Palmer, The Emerging Politics of DHS Fusion Centers, 40 Security Dialogue 617 (2009).

<sup>396</sup> For a sense of slowing increasing state activity in these areas, see National Conference of State Legislatures, Law Enforcement Overview (2018), <http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx>.

<sup>397</sup> Campbell, *supra* at 227; see David Ball, Tough on crime (on the state’s dime): how violent crime does not drive California counties’ incarceration rate and why it should, 28 Ga. St. L. Rev. 987 (2012); Mona Lynch, Mass Incarceration, Legal Change and Locale: Understanding and Remediating American Penal Overindulgence, 10 Crime Public Policy 673 (2011).

<sup>398</sup> Miriam Seifter, Gubernatorial Administration, 131 Harv. L. Rev. 483 (2017).

<sup>399</sup> Albert J. Reiss, Jr., Police Organization in the Twentieth Century, 51, 64, in 15 Crime & Justice (Modern Policing) (1992). (“Coordination is largely voluntary with only occasional formal arrangements among local governments through the institution of contract policing, the setting of minimum standards for policing, or the institution of state-mandated training.”).

<sup>400</sup> See Albert J. Reiss, Jr., Police Organization in the Twentieth Century, 51, 64, in 15 Crime & Justice (Modern Policing) (1992) (“Pressures toward consolidation, coordination, and integration of local law enforcement encounter substantial resistance as they run counter to the prevailing ideals of local government in the United States. The decentralization of power, authority, and decision making within organizations conforms to the ideals of democratic government and remains the dominant ideology in law enforcement.”).

<sup>401</sup> Child Support Recovery Act, Pub. L. No. 102-521, § 228(a), 106 Stat. 3403 (1992) (codified as amended at 18 U.S.C. sec. 228) (reflecting 1998 upgrade of offense from a misdemeanor to a felony). For a recent example of a federal offense created to solve a state-to-state coordination problem, see Catherine Wimberly, Deadbeat Dads, Welfare Mom, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families, 53 Stan. L. Rev. 729, 766 (2000) (arguing for elimination of federal criminal enforcement regime because “states are more than capable and are ultimately more effective in catching and convicting the most hard-core of child-support evaders”).

continuities with the Dyer Act. And it highlights the lasting effects of a process that, while building federal capacity,<sup>402</sup> relieved states from having to fashion adequate coordination strategies and retarded the extension of even a modicum of state control over local police departments.<sup>403</sup>

The story of how the FBI helped shape the US policing network and was itself shaped by that network is, in the end, a story about our government and ourselves. Joyce and Mukerji powerfully suggest that we should see “the state not as a thing but as a shape-shifting assemblage of people and things.” Far from being a unitary actor, they explain, it “is at heart a communication complex and territorial entity, one that keeps reweaving the fabric of government with changing lines of communication and different ways of managing problems of distance.”<sup>404</sup> If one seeks to find the Bureau’s place in the American state, one needs to look within this fabric, not plumb imagined depths.

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<sup>402</sup> Time will tell whether the pre-existence of well-functioning horizontal policing collaborations in the European Union will impede the rise of Europol and the European Public Prosecutor’s Office as independent players, see Ester Herlin-Karnell, *The Establishment of a European Public Prosecutor’s Office: Between “Better Regulation” and Subsidiarity Concerns*, in *Shifting Perspectives on the European Public Prosecutor’s Office* (W. Geelhoed et al. eds. 2018); Carlos Gomez-Jara Diez, *European Federal Criminal Law: The Federal Dimension of EU Criminal Law* (2015), as they will lack the Bureau’s platform leverage.

<sup>403</sup> See Eliot H. Lumbard, *State and Local Government Crime Control*, 43 *Notre Dame L. Rev.* 889, 895 (1968) (“By and large, state governments minimized their crime control responsibilities until the past five years or so.”). The lack of state centralization was still observed in 1978 (ten years later). See Daniel L. Skoler, *Criminal Justice Organization, Financing, and Structure: Essays and Explorations* 75 (1978) (“Direct consolidation or centralized supervision of criminal justice functions has largely been ignored as a coordinating mechanism, partly because of the constitutional separation of powers, partly because of the fractionalization of law enforcement between state, county and local government, partly because of legitimate needs for autonomy of certain components vis-a-vis others, and partly because recent consolidation of state government functions has tended to place criminal justice units in other governmental service’ groupings.”).

<sup>404</sup> Patrick Joyce & Chandra Mukerji, *The State of Things: State History and Theory Reconfigured*, 46 *Theory & Society* 1, 15 (2017).